90-748

No. 90-

in the

Supreme Court

of the

United States

October Term, 1990

DAVID JACK VOGT, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HARRY M. SOLOMON, ESQ.
HARRY M. SOLOMON, P.A.
Counsel for Petitioner
799 Brickell Plaza, #801
Miami, Florida 33131
Telephone: (305) 358-7400

QUESTIONS PRESENTED

I.A.

WHETHER THE STATUTE OF LIMITATIONS IN A RICO PROSECUTION UNDER 18 U.S.C. §1962(a) BEGINS TO RUN FROM THE LAST ACT OF RACKETEERING ACTIVITY ALLEGED IN THE INDICTMENT AND PROVED AT TRIAL?

I.B.

WHETHER, ASSUMING ARGUENDO THAT THE STATUTE OF LIMITATIONS IN A PROSECUTION UNDER 18 U.S.C. §1962(a) BEGINS TO RUN FROM THE LAST "USE OR INVESTMENT" OF RACKETEERING PROCEEDS, THE PHRASE "TO USE OR INVEST" FOUND IN THE STATUTE CAN BE READ SO EXPANSIVELY AS TO INCLUDE THE DIVESTITURE OF ASSETS TO DISMANTLE THE ENTERPRISE, SO AS TO BRING THE PROSECUTION WITHIN THE LIMITATIONS PERIOD?

II.

WHETHER PETITIONER CAN PROPERLY BE CONVICTED OF CONSPIRACY WHEN THE CO-CONSPIRATORS NAMED IN THE SAME CONSPIRACY COUNT ARE ACQUITTED IN A JOINT TRIAL?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 910 F.2d 1184 (4th Cir. 1990). (A.1). Although not part of the appeal to the Circuit Court, the District Court's Memorandum Opinion on the related forfeiture issue (which was heard non-jury) is reported at 713 F.Supp. 847 (M.D.N.C. 1987). (A.39).

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was filed on July 26, 1990. (A.1). Petitioner's timely Petition for Rehearing was denied on August 16, 1990. (A.86). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. §1962(a) provides:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity...to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. §3282 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

A. Course of Proceedings And Basis For Federal Jurisdiction.[1]

On January 5, 1987, a superseding indictment was returned in the Middle District of North Carolina against Petitioner and his two attorneys, Levey and Ray. Count One charged Petitioner alone with a substantive violation of 18 U.S.C. §1962(a). Count Two charged all three with conspiracy to violate §1962(a). Count Three charged all three with conspiracy to impede the Internal Revenue Service in the ascertainment, computation and collection of federal income taxes in violation of 18 U.S.C.§371 (a "Klein" conspiracy).[2]

Petitioner's pre-trial Motion To Dismiss Counts One And Two As Time Barred Under 18 U.S.C. §3282 was denied by the District Court by written Order filed on Feburary 24, 1987. (A.36). Similarly, Petitioner's several motions for judgment of acquittal made during and after trial pursuant to Fed.R.Crim.P. 29, directed to the failure to commence the prosecution within the applicable limitations period, were also denied.

Following a lengthy trial, Petitioner was convicted of Counts One (substantive RICO violation) and Three (Klein conspiracy), and acquitted of Count Two (RICO conspiracy). Levey and Ray were acquitted of all counts.

Following entry of the Judgment and Commitment Order, Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. See 28 U.S.C. §1291. On July 26, 1990, the Court filed its opinion denying relief. (A.1). Rehearing

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[1]All parties to the proceeding in the United States Court of Appeals for the Fourth Circuit appear in the caption of this case.

[2]See *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957).

was denied on August 16, 1990. (A.86).

B. Facts.

From 1971 through early 1979 (when he was given a disability retirement), Petitioner was an officer for the United States Customs Service stationed in South Florida. At trial, the Government elicited testimony to establish that between the years 1976 and 1978, Petitioner accepted several hundred thousand dollars in bribes from Phillip Keidaish III, who Petitioner had arrested in 1974, for customs information to help insure the success of various smuggling ventures.[3]

In 1978, Keidaish got out of the marijuana smuggling business. In 1979, he introduced Petitioner to Levey, an attorney in Miami. Over the next few years, Levey provided legal services to Petitioner, many of which were at issue in this case.

Count One of the indictment charged that Levey, with the assistance of attorney Ray in North Carolina, used five foreign and domestic corporations to "launder" the bribe proceeds. According to the Government's case, the funds were deposited in offshore accounts, repatriated into the United States through Levey's trust account or other bank accounts in the names of the various corporations. The funds were used largely to purchase either real property or items such as motorhomes, an airplane, a boat and several vehicles. The five corporations set forth in Count One as the "enterprise" were Real Tech International, Ltd., a Cayman corporation; Chardon Company, a Netherlands Antilles corporation; Silver Realty Corporation, Continental Aero Marine, Inc., and Costalotta, Inc., North Carolina corporations.

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[3]These bribes, allegedly paid between 1976 and 1978, comprised the series of racketeering acts set forth in Count One of the indictment.

The main Government witness to the financial aspects of this case was Harvey Mitchell, an automobile dealer who had a car agency and a residence in the Middle District of North Carolina. Mitchell owned the Colonial Manor apartment buildings in Greensboro, North Carolina. Mitchell first met Petitioner and Petitioner's wife in July of 1978, when they were introduced to him by a mutual friend as perspective purchasers of the apartments. Mitchell testified that the Vogts purchased Colonial Manor from him in the fall of 1978 for one hundred twenty five thousand dollars ($125,000.00) (including a one hundred thousand dollar [$100,000.00] "under the table" cash payment) plus assumption of the two existent mortgages on the property.

When the second mortgagee would not allow Petitioner and his wife to assume that mortgage, Chardon Company N.V. purchased the mortgage, which had an approximate value of one hundred seventy eight thousand dollars ($178,000.00). In November of 1980, Petitioner and his wife sold the apartment buildings to a developer for one million four hundred twenty five thousand dollars ($1,425,000.00), realizing a net profit from the sale of approximately six hundred fifty thousand dollars ($650,000.00).

Mitchell also testified to several financial transactions between himself and Petitioner, commencing in 1978 and culminating in December of 1981, involving Mitchell's home in North Carolina and the purchase of motorhomes and other vehicles. These transactions involved loans or outright purchases by offshore corporations, especially Chardon and Real Tech International, Ltd.. Additionally, Silver Realty Corporation and Costalotta, Inc., the North Carolina corporations, held the title to several vehicles which were purchased through Mitchell.

The Government also established the purchase by Petitioner, in April of 1980, of a single engine airplane which

was titled in the name of Continental Aero Marine, Inc., and in January of 1980, of a boat titled in the name of Real Tech International, Ltd.

The proof at trial established that the last purchase of or investment in any asset involving an enterprise corporation was a Bluebird motorhome (titled to Costalotta, Inc.) which was paid for and delivered by December of 1981. While there were other financial transactions consisting of purchases and investments after that date, those transactions either did not involve an enterprise corporation, or did not constitute a "use or investment" of racketeering proceeds in the acquisition of an interest in or the operation of the named enterprise.

Mitchell testified that in June of 1982, he agreed to repurchase the motorhome, which he did with two cashier's checks in July and September of 1982. The Government also established the *sale* of the airplane by Continental Aero Marine, Inc. (an enterprise corporation) to an innocent purchaser in July of 1982 and the *sale* of the boat titled in the name of Real Tech International, Ltd. (an enterprise corporation) to an innocent purchaser in August of 1982. At trial, during closing argument, the Government referred to these transactions, which occurred from June of 1982 through February of 1983, as the "dismantling" of the enterprise.[4]

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED

[4]Pretrial, the Government argued that the dismantling of the enterprise in 1982 was Petitioner's response to his growing legal problems in the State of Florida, where he was soon indicted for (and acquitted of) having accepted the same bribes from Keidaish that comprised the several racketeering acts set out in Count One of the indictment.

BY THIS COURT.

A. Commencement Of Five Year Statute of Limitations For Prosecutions Under 18 U.S.C. §1962(a).

Before both the District Court and the Circuit Court, Petitioner took the position that in prosecutions under 18 U.S.C. §1962(a), the statute of limitations begins to run from the last act of racketeering activity alleged in the indictment and proved at trial. Since the last act of racketeering activity alleged in Count One and (**arguendo**) proved at trial occurred in August of 1978, and since the indictment was not returned until January 5, 1987, the applicable five year statute of limitations set forth in 18 U.S.C. §3282 had expired as to that count on its face.

In deciding this issue against Petitioner, the Fourth Circuit Court of Appeals noted:

> So far as we are advised, no federal court has ruled directly on the question of when the five-year statute of limitations begins to run for prosecutions under §1962(a). *United States v. Vogt*, 910 F.2d 1184, 1196 (4th Cir. 1990) (A.18-19).

It is submitted that this important question of federal law should be resolved by this Court.

The Circuit Court held that, unlike prosecutions under §1962(c), the language of §1962(a) requires that the statute of limitations for prosecutions under it run not from the last act of racketeering activity alleged and proved, but rather from the last "use or investment" of racketeering proceeds in the establishment or operation of an enterprise. *Id.* at 1196-1197 (A.18-22). *Cf. United States v. Torres-Lopez*, 851

F.2d 520 (1st Cir. 1988), *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), *United States v. Bethea*, 672 F.2d 407 (5th Cir. Unit B 1982).

While the Court's reasoning may have superficial appeal under traditional legal precepts (cf. *Pendergast v. United States*, 317 U.S. 412 [1943]), the decision fails to address the specific purpose and nature of the RICO statute. In *Sedima, S.P.R.L. v. Imrex, Co., Inc.*, 473 U.S. 479, 481-482, 498 (1985) and in *United States v. Turkette*, 452 U.S. 576, 589 (1981), this Court recognized that RICO is a remedial, as opposed to a substantive, statute. As noted in *United States v. Neapolitan*, 791 F.2d 489, 495 (7th Cir. 1986):

> The provisions of section 1962 do not create "new crimes" but serve as the prerequisites for the invocation of increased sanctions for conduct which is proscribed elsewhere in both federal and state criminal codes. See Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts-Criminal and Civil Remedies*, 53 Temp. L.Q. 1009, 1021 (1980).

See also 18 U.S.C. §1961(1) and *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir.) *cert. den.* 465 U.S. 1005 (1984).

Since the gravamen of all RICO prosecutions, including those under §1962(a), is the racketeering acts, the statute of limitations should commence to run from the commission of the last such act alleged and proved. The Circuit Court opinion ignores the fundamental premise of RICO and artificially dissects its three substantive subsections. While the Court dismissed language supporting Petitioner's position in *Bankers Trust Company v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988) (*Vogt* at 1196, n.2) (A.19) as erroneous dictum in a civil case (a conclusion with which Petitioner disagrees), it additionally disregarded the fact that there is virtually no

difference between civil and criminal applications of RICO. Cf. *Sedima,* in which this Court rejected the requirement of a separate "racketeering injury" beyond the racketeering acts themselves as a prerequisite to civil RICO actions.[5]

In point of fact, the Government used §1962(a) in this case to prosecute a "money laundering" case, since no money laundering statutes existed at the time. This "gap" in the law has now been remedied by the passage of money laundering statutes. Had 18 U.S.C. §1956 and §1957 been in existence at the time of this prosecution, the Government could have brought this action under those statutes and have been entitled to invoke the limitations period applicable to the conduct proscribed therein. However, those statutes were not in existence at the time of this prosecution and the Government is restricted to the statute of limitations applicable to §1962(a). Contrary to the holding of the Circuit Court, that statute of limitations begins to run from the last racketeering act alleged and proved.[6]

Finally, the Circuit Court's rejection of Petitioner's argument regarding the need for uniformity in the application of the statute of limitation to the substantive subsections of §1962 (*Vogt* at 1197) (A.21-22) disregards this Court's recent expression of the desirability of such uniformity in the application of limitations periods in the context of civil actions brought under RICO. *Agency Holding Corporation v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987).

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[5]The holding of the Circuit Court also ignores the repeated admonition of this Court that "...criminal statutes of limitation are to be liberally interpretated in favor of repose." *United States v. Marion*, 404 U.S. 307, 322 n.14 (1971), *Toussie v. United States*, 397 U.S. 112 (1970), *United States v. Habig*, 390 U.S. 222, 227 (1968).

[6]Parenthetically, 18 U.S.C. §1961(1) has been amended by Congress to include violations of 18 U.S.C. §§1956 and 1957 as predicate acts of racketeering activity. See Pub.L. 99-570, §1365(b) (1986).

B. Improper Application of the Phrase "To Use Or Invest" Found in 18 U.S.C. §1962(a).

The Circuit Court also rejected Petitioner's contention that even if the statute of limitations commenced to run from the last "use or investment" of racketeering proceeds, there was a failure of proof as to applicable transactions within the charging period, thereby making the prosecution factually untimely. *Vogt* at 1197-1199 (A.22-26).

Since the statute proscribes the "use or [investment]" of racketeering proceeds "...in [the] acquisition of any interest in, or the establishment or operation of, any enterprise...", in order for a prosecution to be timely under the Circuit Court's ruling, there must still be such a "use or investment" within the limitations period. Under this view of the applicability of the statute of limitations, since the indictment was returned on January 5, 1987, there must have been a use or investment of racketeering proceeds in the establishment or operation of the enterprise subsequent to January 5, 1982, in order for the prosecution to have been timely.

Although many of the terms associated with RICO are defined in 18 U.S.C. §1961, the phrase "to use or invest" is not so defined. In ruling that the Government had proved sufficient uses or investments within the limitations period, the Circuit Court, ignoring the rules of statutory construction for criminal cases (including RICO cases), gave an extraordinarily expansive definition to that phrase. To compound the problem, the Court paid lip service to, but ultimately neglected the fact that in determining whether or not there were sufficient "charging period transactions", it is not enough to simply prove "uses or investments" of proceeds. The additional requirement is that such uses or investments must be in furtherance of the acquisition, establishment or operation of the enterprise.

There is no doubt that financial transactions occurred subsequent to January 5, 1982. However, when these transactions are examined, none qualifies as a use or investment of funds in the establishment or operation of the enterprise. The Government's legal position in this matter had always been that in 1982 and 1983, Petitioner, in anticipation of an impending indictment in the State of Florida, began to dismantle his enterprise through the sale of assets. (See also, A.60,74,78-79). The Circuit Court held that these sales of assets under such circumstances qualified as a "use" of funds in the operation of the enterprise. *Vogt* at 1199 (A.25-26). The illogic of this holding is apparent on its face.

The Circuit Court criticized the Government for its narrow examples of charging period transactions and stated that there were ample examples of "other things" to support the finding of timeliness. *Vogt* at 1198 (A.23-24). However, when pressed to give examples, the Court could only refer to sales of assets which occurred in furtherance of the Government's theory of the dismantling of the enterprise. While the Circuit Court loudly trumpeted the existence of limitations period transactions, constrained by the evidence, it could not cite to valid ones. Strongly illustrative is the 1983 sale of the former Mitchell residence to Petitioner's parents. The trial record clearly reflects that the only funds involved in the transaction were the legitimate funds of the parents. If the transaction was a "sham," *Vogt* at 1199 (A.25), it certainly was *not* a use or investment of racketeering proceeds!

The reality of the evidence in this case is that the last "use or investment" of racketeering funds occurred in December of 1981, when Petitioner took possession of the Bluebird motorhome. There were no transactions subsequent to January 5, 1982 which qualify as a "use or investment" of proceeds *in the establishment or operation of the enterprise.* C.F. A.42-61.

The legal infirmity of the Circuit Court's analysis is ultimately based on its improper interpretation of what constitutes a use or investment of proceeds. Congress' admonition to construe RICO liberally to effectuate its remedial purposes, see Pub.L. 91-452, §904(a), 84 Stat. 947 (1970), does not license a reviewing court to totally disregard proper rules of statutory construction in criminal cases, to distort a statute beyond its plain meaning or to reach an absurd result. *United States v. Turkette*, 452 U.S. 576, 580 (1981). It is absurd to interpret the statute so as to allow the sale of assets in an effort to dismantle the enterprise to constitute a use of funds in the operation of the enterprise.[7] Virtually none of the examples given by the Circuit Court qualify as a use or investment of funds in the establishment or operation of the enterprise under proper rules of statutory construction.[8]

Since the phrase "to use or invest" found in §1962(a) is not defined in §1961, and has not heretofore been addressed by this Court, the important question of the proper interpretation of the phrase should be settled by this Court.

II. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT, SINCE THE DECISIONS OF THIS COURT ITSELF ON THE QUESTION MAY BE IN CON-

[7]See footnote 5.

[8]It is not a correct interpretation of the statute to state, as did the Circuit Court that "...every time tainted funds or assets purchased with tainted funds were run into or out of one of the enterprise corporations...this constituted a 'use' by [Petitioner] of those funds or their proceeds in the 'operation' of the enterprise in its intended function..." *Vogt* at 1199 (A.25-26). If the funds are "run out" of the corporation as part of a dismantling of the enterprise, the statute is not violated.

FLICT, AND SINCE THERE IS CONFLICT AMONG THE CIRCUITS ON THE QUESTION.

Count Three of the indictment charged Petitioner with a "Klein" conspiracy, in violation of 18 U.S.C. §371. Petitioner was convicted. The two named co-conspirators, Levey and Ray, were acquitted.

Citing its recent ruling in *United States v. Thomas,* 900 F.2d 37 (4th Cir. 1990), the Circuit Court held that the facial inconsistency of the verdict was not a bar to the affirmance of Petitioner's conviction. The Court specifically held that "...sufficient evidence exists of a conspiracy between [Petitioner] and his acquitted co-conspirators to uphold the jury's verdict against [Petitioner]." *Vogt* at 1203 (A.35).

In *United States v. Thomas,* 900 F.2d 37 (4th Cir. 1990), the Circuit Court, citing (*inter alia*) this Court's decisions in *United States v. Powell,* 469 U.S. 57 (1984), *Standefer v. United States,* 447 U.S. 10 (1980) and *Dunn v. United States,* 284 U.S. 390 (1932), held that the old common law "rule of consistency" did not preclude inconsistent verdicts in a conspiracy case. *Id.* at 40. Based primarily on this Court's decision in *Powell,* the First, Ninth and Eleventh Circuits have now held that inconsistent verdicts are not precluded in the same conspiracy count in a joint trial. See *United States v. Bucuvalas,* 909 F.2d 593 (1st Cir. 1990), *United States v. Valles-Valencia,* 823 F.2d 381 (9th Cir. 1987) and *United States v. Andrews,* 850 F.2d 1557 (11th Cir.) *cert. den.* — U.S. —, 109 S.Ct. 842 (1989).

In *United States v. Suntar Roofing, Inc.,* 897 F.2d 469, 475-476 (10th Cir. 1990), the Tenth Circuit, noting that the decision of this Court in *Powell* did not discuss or overturn this Court's previous decision in *Hartzel v. United States,* 322 U.S. 680 (1944), continued to hold (based on "the traditionally recognized exception" found in *Hartzel*) that a conspiracy

conviction cannot stand where all the alleged co-conspirators are acquitted. See also *United States v. Howard*, 751 F.2d 336 (10th Cir.) *cert. den.* 472 U.S. 1030 (1985) and *Romontio v. United States*, 400 F.2d 618 (10th Cir.) *cert. dism.* 402 U.S. 903 (1971).

In *Hartzel v. United States*, 322 U.S. 680 (1944) this Court held that it was "impossible to sustain the petitioner's conviction upon...the conspiracy count" where the convictions of his co-defendants had been set aside by the trial court. *Id.* at 682, n.3. Petitioner would submit that the decision in his case is controlled by *Hartzel*, which recognizes the *sui generis* status of the law of conspiracy. *United States v. Andrews*, 850 F.2d 1557, 1571 (11th Cir. 1988) (Clark, J. dissenting).

Although *Powell* holds generally that jury verdicts are insulated from review on the ground that they are "inconsistent", 469 U.S. at 68-69, *Powell* was not a conspiracy case. Nor did it mention the prior holding of this Court in *Hartzel*, which, as noted, was a conspiracy case. None of the authorities cited in *Powell* (including *Dunn*) involved conspiracy cases.

It is submitted that the decision in *Vogt* is controlled by *Hartzel*, and not by *Powell* and those authorities cited therein. The Circuit Court squarely based its holding on the view that this facially inconsistent jury verdict was insulated from review on the basis of its inconsistency. *Vogt* at 1203 (A.35). The intervention of this Court is needed to clarify the status of the law on this important question.

CONCLUSION

For the reasons set forth above, Petitioner respectfully urges this Court to grant its Writ of Certiorari.

Respectfully submitted,

HARRY M. SOLOMON, P.A.
By: Harry M. Solomon
Counsel for Petitioner
799 Brickell Plaza, #801
Miami, Florida 33131
(305) 358-7400

Appendix

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5007

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

versus

DAVID JACK VOGT, JR.,
Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Frank W. Bullock, Jr., District Judge. (CR-86-199-G)

Decided: July 26, 1990

Before RUSSELL, PHILLIPS, and MURNAGHAN, Circuit Judges.

PHILLIP, Circuit Judge:

David Jack Vogt, Jr. appeals from a final judgment and commitment order entered on a jury verdict finding him guilty of a RICO violation under 18 U.S.C. § 1962(a), and of conspiring to defraud the government in violation of 18 U.S.C. § 371. We affirm his conviction on both counts.

I

In the light most favorable to the government, the critical facts, in summary, are as follows.

Vogt was a United States Customs Service officer stationed in South Florida from 1971 through early 1979. In May of 1974, Vogt arrested Philip Keidaish III, a member of a drug smuggling ring, for a sojourn violation. Some time later the two men struck a deal under which Keidaish paid Vogt substantial sums of money in return for Vogt's giving Keidaish Customs Service information that facilitated Keidaish's drug smuggling operation. This arrangement was in effect from late 1976 until late 1978 when Keidaish

got out of the smuggling business. During this time Vogt was paid between $500,000 and $800,000 for his services, usually in payments of around $100,000 following each smuggling operation for which Vogt gave assistance. Vogt was a member of the Customs Service throughout this period until early 1979 when he was granted a pensioned disability retirement.

At some point in their relationship, Keidaish and Vogt discussed the possibility of using foreign bank accounts and corporate entities as a means of "laundering" Vogt's illegally obtained money. Following up on this, Keidaish introduced Vogt to Burton R. Levey, a Miami attorney, whose firm, by the use of foreign banks and foreign and domestic corporations, had assisted Keidaish in concealing and using funds generated by his smuggling operations. From that point on, Levey assisted Vogt in an elaborate scheme of concealment of the source of the funds while facilitating Vogt's access to and use of those funds and their proceeds for his private purposes.

The basic mode of operation of the scheme was as follows. Vogt's illegally obtained money was deposited in various foreign bank accounts in the Grand Cayman Islands and the Netherlands Antilles. From those accounts it was withdrawn from time to time and funnelled through various trust accounts maintained by Levey's law firm and associated law firms and through several foreign and domestic corporations, some formed by Levey or at his direction, ultimately to be used by Vogt for a variety of investments, loans, and luxury purchases. Five corporations, either formed by or at Levey's direction, or sometime clients of his firm, were utilized: Real Tech International, Ltd., chartered in Grand Cayman, British West Indies; Chardon Company NV, chartered in Curaçao, Netherland Antilles; and Silver Realty Corporation, Continental Aero Marine, Inc., and Costalotta, Inc., all chartered in North Carolina, where Vogt maintained his residence and engaged in various

ventures following his retirement from the Customs Service in 1979. Also participating in the scheme's functioning, whether or not as culpable principles, were Darryl Myers, a Grand Cayman attorney, William C. Ray, a North Carolina attorney, both of whom were associated from time to time in transactions directed by Levey for Vogt's benefit, and Harvey Mitchell, a Burlington, North Carolina, automobile dealer and entrepreneur, who engaged in a variety of investment, purchase/sale and credit transactions with Vogt.

Some specific examples of the scheme's operation using these corporations, law firm trust accounts, and foreign bank accounts suffice to illustrate its intended and actual function.

In July of 1978, Vogt, having received over $500,000 in bribe money over the preceding two years, was introduced to Mitchell as a prospective purchaser of Mitchell's Colonial Manor apartment complex in Greensboro, North Carolina. Vogt and Mitchell negotiated a purchase price of $125,000 cash plus the assumption of two mortgages. One of the mortgages, with a balance of around $174,000, was held by Planters Bank, which demanded a financial statement from Vogt in connection with the planned assumption of their mortgage. Vogt declined to provide it. During the closing transactions in late 1978, Vogt participated as ostensible representative of Chardon Company NV, the Netherlands Antilles corporation which had just been formed under Levey's direction in late November of 1978. In the closing, Vogt paid $100,000 in cash, another $25,000 was paid from a local attorney's trust account, and the Planters Bank mortgage was not assumed, as originally agreed, but paid off in full by Vogt using a Chardon Company NV check drawn on an account in the Bank of Nova Scotia, Grand Cayman, British West Indies. Chardon Co. took a second mortgage on the property to secure this advance. Some two

years later, in late 1980, Vogt sold the Colonial Manor complex for $1,425,000. After payment of the Chardon Co. mortgage and another, this yielded Vogt and his wife a profit of around $653,000. The settlement check to Chardon Co. was returned to Grand Cayman and deposited, over Attorney Myers' endorsement, in the Bank of Nova Scotia, from whence the original advance had come.

In April 1979, Levey opened a new law firm trust account in the name of Silver Realty Corporation. In May 1979, such a corporation was chartered, by Levey's direction, in North Carolina, where Vogt was by then settled. It thereafter served as the conduit for purchases and as the nominal holder of title to a number of vehicles, essentially luxury and recreational types, which were bought by Vogt for cash and delivered to him personally. Immediately after its formation, Vogt transferred to this corporation the title to an FMC motor home which he had purchased for $32,000 cash in August 1978. A month later, in June 1979, Vogt bought a new Jeep for over $8,000 cash and titled it to this corporation. The next year, 1980, he traded the 1979 Jeep, which had been damaged on a coastal fishing expedition, for a new 1980 Dodge Omni which was titled by Vogt's direction to the friend who had introduced Vogt to Mitchell. Silver Realty received nothing in exchange for the 1979 Jeep, but in February 1980, Vogt bought and took delivery of a new 1980 Jeep which by Vogt's direction was billed and titled to Silver Realty. (As an aside to these recreational vehicle purchases, it may be noted that in March of 1980, Vogt purchased for cash a Cadillac De Ville, which eight months later, in November 1980, he traded in on a new 1981 Cadillac, for which boot of $14,000 was paid by a check on the Colonial Manor account, with title being put in the name of Vogt's parents in Florida.)

In August of 1979, Vogt arranged a loan of $50,000 to

Mitchell, to be secured by a second mortgage on Michell's Greensboro residence. The loan proceeds were provided by a $50,000 Chardon Co. check drawn on its Nova Scotia Bank account, payable to Mitchell, which was deposited in the Levey firm trust account, from which the net loan proceeds of some $48,500 were then disbursed to Mitchell. Chardon Co.'s advance was secured by a second mortgage on the residence.

Some three months later, in November 1979, Mitchell transferred this residence, in a deal personally negotiated and handled through closing by Vogt, for $175,000 cash plus assumption of mortgages. A part of the cash component of the purchase price was provided out of a check for $115,000, payable to Mitchell, from a Levey law firm trust account (the balance going for the purchase of two Mercedes automobiles from Mitchell). By Vogt's direction, titles to the Mitchell residence and the two Mercedes were put in the name of Real Tech International, one of Levey's off-shore corporate clients. Thereafter Vogt had free use of the vehicles, one of which was kept at the Mitchell residence.

After this sale, Mitchell remained in occupancy of the residence under an agreement with Vogt by which Mitchell continued to pay the taxes, utilities, insurance and the mortgage payments to Chardon Co. and the Federal Land Bank, holder of the first mortgage, as a form of rent. In April 1981, Mitchell and Vogt entered into a written agreement giving Mitchell a one-year option to repurchase the residence. Vogt signed this option agreement in his individual capacity, and at the same time directed Mitchell to deliver to William C. Ray, Vogt's local attorney, a 1981 Cadillac Eldorado in discharge of accrued interest of $16,000 that Mitchell then owed on the Chardon Co. second mortgage on the property.

Mitchell did not exercise the option and in July of 1982, was pressed by Ray, Vogt's attorney, for payment of his share of the annual installment on the Federal Land Bank

mortgage. After an unsuccessful effort to negotiate with Vogt, through Ray, a repurchase of the residence for $100,000 in South African kruggerands in August or September of 1982, Mitchell made a payment to Ray for his share of the mortgage installment due the Federal Land Bank, then vacated the residence in October 1982. Ray remitted the payment then due to the Federal Land Bank and directed that the billing be changed to Real Tech International, which would assume the mortgage. When the Federal Land Bank declined to recognize a formal assumption of the mortgage by Real Tech International, Ray directed that future billings be made in the name of Ray and Mitchell, care of Ray. The Federal Land Bank had not earlier been notified of the transfer of title from Mitchell to Real Tech International. Around four months later, in February of 1983, Ray, signing as attorney-in-fact for Real Tech International, notified the Federal Land Bank that the property had been transferred to Vogt's parents who then formally assumed the outstanding mortgage balance of around $70,000, which was satisfied in full shortly thereafter.

In July of 1981, Costalotta, Inc., was incorporated by attorney Ray in North Carolina. Earlier in that month Vogt, with his wife, had visited a national "rally" of motor home owners in Denver, Colorado, and there ordered from Mitchell, who was in attendance as a dealer, a new 40-foot Bluebird Motorhome with a list price of around $280,000. A $20,000 deposit on this purchase was later made by Ray with a check in that amount drawn on a Guiness Mahon Cayman Trust Ltd. account. The original receipt for this deposit was made out to Vogt, but by Ray's direction Vogt's name was marked out and Costalotta, Inc. substituted. Ray paid the balance due of $186,121.80 with a check drawn on Scotiabank, The Bank of Nova Scotia, Grand Cayman. In December 1981, the motorhome was delivered to Vogt personally, but was titled to Costalotta, Inc. Ray signed the

transfer documentation papers as President of Costalotta. In July 1982, Mitchell repurchased the motorhome from Vogt as a result of direct negotiations with Vogt. Payment was by a cashier's check for $185,000, payable to Costalotta, Inc. This check was given to Vogt and then assigned by special endorsement of Ray, as President of Costalotta, to Real Tech International, and was then deposited by Real Tech in the Bank of Nova Scotia account.

As indicated, these are but some examples of Vogt's use of foreign bank accounts, foreign and domestic corporations, and law firm trust accounts to conceal and make available for his personal use and investment the original bribe money in excess of a half million dollars that he had received from Keidaish together with proceeds from that money. Other examples of his laundering activities by these means during the period 1978-1982 abounded in the evidence. A few only may be noted in this summary.

His wife received periodic checks in amounts of $3,000 and $4,000 from various ones of the off-shore accounts, and deposited them in her joint account with Vogt. Nine months after Vogt caused title to the two Mercedes to be placed in Real Tech International, they were "sold" to Vogt's wife at substantial discounts. In addition to the fleet of recreational and luxury land vehicles which Vogt purchased and titled to Real Tech International, Silver Realty, and Costalotta, Inc., Vogt also purchased an expensive boat and airplane during this period. The boat was purchased on January 18, 1980, for $62,164 with a cashier's check funded by a Levey trust account, titled in the name of Real Tech International, and used for pleasure by Vogt. The airplane was purchased by Vogt in September 1980 for $122,500 plus a trade-in. Vogt paid the cash portion of the purchase price with a Levey trust account check, and had title put in Continental Aero-Marine, a North Carolina corporation that had been chartered in May 1980, by Ray at Levey's direction. Vogt took delivery and used the plane thereafter as he cared to

do. As an added concealment device, Vogt used the alias "Jim Owens" in a number of purchase/sale transactions.

During this period, Vogt's income tax returns of course reported no such sums of money as he received in bribes from Keidaish, instead reporting rather modest sums from investments in otherwise unidentified "island accounts" and from operation and ultimate sale of the Colonial Manor property.

In October of 1986, a federal grand jury in the Middle District of North Carolina returned an indictment charging Vogt, Levey, and Ray with a single count of conspiracy to impede the Internal Revenue Service in the ascertainment, computation and collection of federal income taxes in violation of 18 U.S.C. § 371, (a *"Klein"* conspiracy),[1] based on the conduct above summarized. On January 5, 1987, a multi-count superseding indictment was filed. Count I charged Vogt alone with a substantive RICO violation under 18 U.S.C. § 1962(a); Count II charged Vogt, Levey, and Ray with conspiracy to violate § 1962(a); Count III repeated the *Klein* conspiracy charge against Vogt, Levey, and Ray.

Following a two-month trial in which Keidaish and Mitchell were principal witnesses for the government against Vogt and the other defendants, the jury found Vogt guilty on Counts I (substantive RICO violation) and III (*Klein* income tax conspiracy), but not guilty on Count II (RICO conspiracy). The jury found both Levey and Ray not guilty on either of the counts under which they were charged, Count II (RICO conspiracy) and Count III (*Klein* conspiracy).

This appeal by Vogt followed.

Vogt assigns a number of errors, some going to his conviction on both counts, some confined to one or the other.

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[1] *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957).

Going to both counts are challenges to a number of evidentiary rulings. Going separately to the RICO count are challenges to the sufficiency of the evidence to convict, to the court's refusal to dismiss the count as facially time barred and the court's related refusal to direct acquittal for failure to prove timeliness of the prosecution, and to the court's RICO "pattern" jury instructions. Going separately to the *Klein* conspiracy count are challenges to the legal sufficiency of the indictment, the sufficiency of the evidence to convict, and the district court's refusal to dismiss the claim as facially time-barred. We take these in the order noted.

II

We first consider briefly a number of challenges to evidentiary rulings, presumably urged as tainting the convictions on both counts. None amounts to prejudicial error.

A

The first, relying on *Bruton v. United States*, 391 U.S. 123 (1968), contests the admission of a statement made by a non-testifying co-defendant to a government agent. The government proffered the testimony of the agent that the attorney co-defendant had told the agent in 1986 that in 1982 he, the co-defendant, had gone to Canada to look for "information concerning his client, David Vogt's, birth certificate." When Vogt objected on *Bruton* grounds, the court admitted the testimony with Vogt's name redacted and gave a cautionary instruction that it could only be considered against the non-testifying co-defendant.

Bruton of course held that the admission of a non-testifying co-defendant's statement inculpating a defendant by name violated the defendant's confrontation clause right, even if a cautionary instruction is given. *See Bruton*, 391 U.S. at 126. More recently, however, the Court has declined to extend this rule to the situation where a defendant's

name is redacted, even though the statement's application to him is linked up by other evidence properly admitted against the defendant. *Richardson v. Marsh,* 481 U.S. 200 (1987). Specifically reserved, however, was the issue raised here, whether *Bruton*'s protection applies where the defendant's name is replaced by a symbol or neutral pronoun, here "client." *Id.* at 211 n.5.

Based on the reasoning in *Richardson,* we think *Bruton* did not bar admission of the redacted statement here. Critically, it did not "on its face" incriminate Vogt, though its incriminating import was certainly inferable from other evidence that earlier had been admitted properly against him. In such a situation, though it may not be easy for a jury to obey the cautionary instruction, "there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*'s [rule]." *Id.* at 208; *see also United States v. Mechanick,* 735 F.2d 136, 141 (4th Cir. 1984), *aff'd in relevant part,* 475 U.S. 66 (1986); *United States v. Sien,* 662 F.2d 277, 282 (4th Cir. 1981).

B

Next Vogt challenges the admission in evidence of a fingerprint card for the purpose of establishing his use of an alias in certain documents. Although counsel for one of his co-defendants objected initially to the admission, Vogt's counsel did not; in fact when the court ordered redacting of certain incriminating information on the card, Vogt's counsel indicated a desire to have the card admitted without redaction. Under these circumstances, the admission cannot be challenged on appeal, *see* Fed. R. Evid. 103(a)(1), unless it constituted plain error, *id.* 103(d). Any error in this admission could not be so considered, in view of Vogt's later stipulation to the very fact for whose proof the card was admitted—that Vogt had used an alias in making some purchases of assets relevant to proof of the charges against him.

C

Several challenges to the admission of evidence of post-offense events are made on relevancy and countervailing risk grounds.

Hollye Austin, a co-defendant's secretary, was permitted to testify as a government witness to comments made and trips taken by Vogt that suggested his knowledge of and participation in certain aspects of the illegal conduct charged to him. Evidence of Vogt's use of false identification and aliases was admitted. Photographs of the expensive contents of a Canadian safety deposit box linked to Vogt were allowed in evidence.

The admission of each of these items of evidence over objection involved assessments of their relevance under Fed. R. Evid. 401, and of possibly contervailing considerations of the risks of unfair prejudice, confusion, and the like under Fed. R. Evid. 403. These assessments are committed to the broad discretion of trial judges, and no abuse of that discretion can be found here. The first two mentioned were relevant as evidence of a consciousness of guilt, *see, e.g., United States v. Eggleston,* 799 F.2d 378 (8th Cir. 1986) (false identification), the last as evidence of an illicit source of wealth, *cf, United States v. Young,* 745 F.2d 733, 753-54 (2d Cir. 1984) (narcotics trafficking). Considered separately or cumulatively, all these items of evidence were relevant in varying degrees to critical issues in the case. Even when considered for their cumulative effect, they could not be thought to pose any real risk of unfair prejudice or confusion sufficient to outweigh their probative value. Their admission therefore lay well within the district court's discretion. *See United States v. Masters,* 622 F.2d 83, 87 (4th Cir. 1980).

D

The last of Vogt's specific challenges to evidentiary rulings involves the prosecution's elicitation of certain

testimony during cross-examination of a defense witness. The prosecutor questioned as follows:

> Q. Have you had occasion to meet Mr. Vogt?
>
> A. I met him one time.
>
> Q. When?
>
> A. It was in Guilford County Jail. Him and myself, we had a visit.

Vogt immediately moved for a mistrial on the ground that the comment that he had been in jail was impermissibly prejudicial. The district court denied the motion, but instructed the jury to "disregard the statements that [the witness] made about any conversations he had with Mr. Vogt." Vogt later requested and received a stronger cautionary instruction that explained that Vogt was being held pretrial because he was a Canadian citizen, not because of any prior convictions.

Vogt now contends that the prejudice caused by the witness' statement was not cured by the cautionary instruction. He argues that the uncured prejudice is demonstrated by the acquittal of both of his co-defendants who were seen "out and about" during trial. In support of his argument, Vogt cites two cases in which convictions were overturned due to careless elicitations of confinement. *See United States v. Warf*, 529 F.2d 1170, 1171 (5th Cir. 1976); *United States v. Ratner*, 464 F.2d 169, 172-73 (5th Cir. 1972). These cases are indistinguishable, however. Both involved elicitations of testimony concerning the defendants' confinement for prior convictions. Here the challenged statement—as carefully explained by the district court in its second cautionary instruction—showed only that Vogt was detained in connection with this case. We are convinced that, on the facts as presented here, it is "highly probable" that the careless elicitation did not affect the judgment in this case; any error in the court's handling was

therefore harmless. *United States v. Nyman*, 649 F2d. 208, 211-12 (4th Cir. 1980). The matter only came up incidentally, neither the witness nor the prosecution made any repeated reference to it, and the court carefully instructed as to its permissible use. *Id.* at 212; *United States v. Morrow*, 731 F.2d 233, 235 n.4 (4th Cir. 1984).

III

We consider next Vogt's assignments of error going separately to his conviction of the substantive RICO violation charged in Count I.

A

Though it is not his principal challenge on this count, we first consider, because of its importance as background to his other challenges, the sufficiency of the evidence to support the jury's verdict of guilty on this count. Our assessment considers the evidence in the light most favorable to the government and asks whether, considering it in that light, *any* rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Glasser v. United States*, 315 U.S. 60 (1942).

We start with the elements of the offense charged in Count I. The charge was laid under 18 U.S.C. § 1962(a) which provides in relevant part that:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

The specific offense charged to Vogt under this section was that:

> From in or about November 1978, up to and including February 25, 1983 . . . [he], having received income derived, directly and indirectly, from a pattern of racketeering activity . . . did knowingly, willfully, and unlawfully use and invest such income and the proceeds of such income, directly and indirectly, in the establishment and operation of the enterprise . . . .

J.A. 33-34.

The pattern of racketeering activity charged was the receipt of the bribe money from Keidaish, eight separate predicate acts of receipt being alleged. The "enterprise" charged consisted of the five corporations earlier identified, which allegedly

> functioned as a money laundering operation whereby currency received by [Vogt] from [Keidaish] would be deposited in foreign financial institutions in the Grand Cayman Islands and the Netherland Antilles, repatriated [sic] into the United States, and invested in properties for [Vogt] . . . held in the names of [Vogt], and/or the [enterprise corporations].

J.A. 33.

To prove the offense charged to Vogt under 18 U.S.C. § 1962(a), the government therefore had the burden to prove that (1) Vogt had derived income from a pattern of racketeering activity; (2) that he then used or invested, directly or indirectly, some part of that income in the establishment and operation, (3) of an enterprise, (4) which was engaged in or affected commerce by its activities. *Cf. United States v. Carlock*, 806 F.2d 535, 547 (5th Cir. 1986) (comparable summary of elements).

Vogt's challenge to the sufficiency of the evidence on this count is quite narrow. It goes only to the lack of proof that he did in fact use or invest any part of the bribe money or its proceeds in the establishment or operation of the laundering enterprise charged. Apppelants' Br. 29-32. He does not challenge the sufficiency of the evidence to prove that he derived income from a "pattern of racketeering activity" by receiving a series of bribe payments from Keidaish. Though at trial his theory of defense was essentially that he did not take any bribe money, hence, by implication, that all proof of what he did with any of his money during the period in issue was simply immaterial, he now concedes, as he must, that Keidaish's direct testimony to the contrary suffices to support a finding against him on that bedrock issue. *Id.* at 29, 30. His contention at this point perforce has become only that there is no direct evidence and insufficient circumstantial evidence to support a finding that, assuming he received the bribe money, he did with it what the indictment specifically charged and § 1962(a) proscribes.

Though he does not expressly concede the point, his argument implicitly concedes, as it must in legal contemplation, that if the evidence supports a finding that he "used or invested" any part of the bribe money or its proceeds in establishing or operating the corporations in the ways charged in the indictment, the same evidence necessarily supports a finding that those corporations constituted and performed the function of the RICO enterprise there charged. Indeed, he makes no other, independent challenge to the sufficiency of the evidence to establish the existence and requisite function of the enterprise charged, *see United States v. Griffin,* 660 F.2d 996, 999 (4th Cir. 1981) ("enterprise" may be an "illegitimate" one), nor to its interstate or foreign commerce connection.

In the end, the argument is only that the essentially undisputed evidence of the many transactions involving

foreign bank accounts, law firm trust accounts, the "enterprise" corporations and Vogt do not sufficiently show Vogt's own "use or investment" of anything, but only the operation of bona fide corporations in which Vogt participated from time to time in regular course as officer or agent. This argument borders on the frivolous.

Section 1962(a) does not exact rigorous proof of the exact course of income derived from a pattern of racketeering activity into its ultimate "use or investment." The key operative terms of the section, as specifically charged here, are expansive, not restrictive ones: "use or invest," "any part," "income . . . or . . . proceeds," "directly or indirectly," "establishment or operation." In combination these broad, disjunctively-phrased terms negate any requirement that the tainted income must be specifically and directly traced in proof from its original illegal receipt to its ultimately proscribed "use or investment" by the defendant. *See United States v. Cauble,* 706 F.2d 1322, 1342-43 (5th Cir. 1984) *United States v. McNary,* 620 F.2d 621, 628-29 (7th Cir. 1980).

Given the statute's deliberately broad reach, the government's proof here easily sufficed to support the jury's finding beyond a reasonable doubt that Vogt did use or invest at least part of the bribe money he received from Keidaish, or some part of the proceeds of that income, in the establishment or operation of the multi-corporation laundering enterprise (or at least some portion of it) charged in the indictment. As reference to our earlier summary of some of the key monetary and property transfer transactions reveals, the proof to support that finding was substantial. A brief recapitulation of some aspects of that evidence will suffice to demonstrate this.

Before sale of the Colonial Manor apartments in 1980 netted Vogt and his wife a substantial profit, they had not received from any tax-reported sources any such sums of money as were expended for the purchase of the various

assets, including Colonial Manor, which had theretofore been purchased by Vogt or at his direction. Though these assets were routinely titled to one or the other of the various "enterprise" corporations, each indisputably was used at their pleasure by Vogt or members of his immediate family. Several times a purchase transaction had actually occurred before the corporation in whose name the purchased asset was later titled had been formed. While Vogt sometimes purported in these transactions to act merely as agent or representative of the corporation then (or later) involved as title-holder, the jury could have found beyond a reasonable doubt, given the use to which the assets were then put, that the corporations were merely dummies "established or operated" by or in Vogt's behalf for the very purpose of concealing the ultimately illegal source of the funds used to purchase them, *i.e.,* to "launder" those funds. Because Vogt's legitimately acquired net worth, as evidenced by his tax returns, would not have financed all these purchases, the jury could have found beyond a reasonable doubt that they were made at least in part with the money received as bribes from Keidaish, or proceeds of that money. Such a course of conduct, if found by the jury, would as a matter of law constitute the use or investment of illegally derived income or its proceeds in the establishment or continued operation of the very multi-corporate enterprise whose function it was to conceal the original illegal source of the funds. *Cf. Cauble,* 706 F.2d at 1342; *McNary,* 620 F.2d at 628-29.

We therefore reject Vogt's challenge to the sufficiency of the evidence to support the guilty verdict on Count I.

B

Vogt's principal challenges to his conviction on Count I go to the district court's refusal to find the prosecution of that count time-barred. He makes two contentions. First, that prosecution was time-barred on the face of the indictment, so that his timely pre-trial motion to dismiss

the indictment on that basis was erroneously denied. Second, alternatively, that if not facially barred, it was barred by the government's failure to prove commission of the offense within the statutory period, so that his timely pre- and post-verdict motions for judgment of acquittal on that basis were erroneously denied.

We consider these in order.

(1)

The RICO statute does not contain its own statute of limitations. Criminal RICO prosecutions therefore are governed, as all here concede, by the catch-all, five-year federal statute of limitations in 18 U.S.C. § 3282. *See Agency Holding Corp. v. Malley-Duff Assoc.*, 483 U.S. 143 (1987). The superseding indictment charging Count I was returned on January 5, 1987. The charging period therefore ran back to January 5, 1982. The indictment charged a pattern of racketeering activity consisting of eight predicate acts of taking bribes between December 1976 and August 1978; it charged acts of use and investment of the bribe money and its proceeds for a period extending to February 25, 1983. J.A. 33-34.

Vogt's contention is that the statute began to run from the date of the last predicate act of racketeering charged, *i.e.*, in August 1978, so that the prosecution which was commenced over five years later, in 1987, was facially time-barred. The district court rejected this contention, holding that with respect to prosecutions under subsection (a), the statute begins to run upon the last act of "use or investment" of illegally derived funds or their proceeds in the "establishment or operation" of an enterprise. Because the indictment charged such acts of use or investment as late as February 25, 1983, well into the charging period, the prosecution was not facially barred.

So far as we are advised, no federal court has ruled directly on the question of when the five-year statute of

limitations begins to run for prosecutions under § 1962(a). Several circuits have held, and we may assume correctly for purposes of this appeal, that the statute does begin to run from the date of the last predicate act of racketeering charged in prosecutions under § 1962(c), which proscribes the "conduct of [an] enterprise's affairs through a pattern of racketeering activity." *See, e.g., United States v. Torres-Lopez,* 851 F.2d 520 (1st Cir. 1988); *United States v. Persico,* 832 F.2d 705 (2d Cir. 1987); *United States v. Bethea,* 672 F.2d 407 (5th Cir. Unit B 1982).[2] The district court thought that triggering rule not applicable to prosecutions under subsection (a) because of critical differences between the conduct separately proscribed by the two subsections.

Simply put, the gravamen of the offense defined in subsection (c) is conduct which by definition is necessarily exactly coincident in time with the continuation of a pattern of racketeering activity. For the specific conduct proscribed is that of conducting an enterprise *through* a pattern of racketeering activity. Once that pattern of activity is ended, the offense under subsection (c) is complete. The enterprise may continue on, but it is no longer being conducted *through* the pattern of racketeering activity. The triggering event under subsection (c) may therefore rightly be identified as the last predicate act making up the pattern of racketeering activity because that also marks consummation of the conduct proscribed.

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[2]Vogt incorrectly asserts in his briefs that "the courts uniformly," and those cited decision in particular, have held that the triggering event under all three substantive subsections of § 1962, (a)-(c), is the last predicate act of racketeering activity. Appellant's Br. 16, 17; Appellant's Reply Br. 6. The cited cases all dealt only with subsection (c) prosecutions, and the opinions nowhere touch upon the applicable rule for subsections (a) and (b). The only case brought to our attention which has suggested such a uniform rule for all three subsections is *Bankers Trust Co. v. Rhoades,* 859 F.2d 1096, 1102 (2d Cir. 1988), a civil case applying a quite different accrual-triggering rule (date of plaintiff's injury) in which the suggestion appears as sheer dictum.

By contrast, the gravamen of the offense defined in subsection (a) is conduct that need not (though it could) be exactly coincident in time with the continuation of the pattern of racketeering activity which is an element of that offense as well. For the conduct proscribed in subsection (a) is that of using or investing funds, or the proceeds of funds, derived *from* the pattern of racketeering activity. Such a use or investment obviously need not occur, and here was not charged to have occurred, during the continuation of the pattern of racketeering activity. Unlike the offense defined in subsection (c), therefore, that defined in subsection (a) is not necessarily consummated by the last predicate act of racketeering activity. Instead, it is only consummated by the quite separate act of use or investment, hence the statute with respect to subsection (a) is only triggered by the last such act charged.

We think the district court's analysis, which we have here recast in our own paraphrase, is sound. Vogt makes two policy arguments against adopting the rule that this analysis produces.[3] First, he urges the virtue of having a uniform triggering event for all three of the substantive RICO offenses defined in subsections (a), (b), and (c). Second, he points to the potential that it creates for

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[3]Vogt also makes a technical argument against the rule by drawing on language in some circuit decisions to the effect that "[t]he provisions of section 1962 do not create 'new crimes' but serve as the prerequisites for the invocation of increased sanctions for conduct which is proscribed elsewhere," *United States v. Neapolitan*, 791 F.2d 489, 495 (7th Cir. 1986), and that "RICO does not criminalize conduct that was legal before its enactment." *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983). His argument from these broad generalizations seems to be that nothing except the predicate acts of racketeering activity defined in § 1961(1) are to be considered as essential elements of the specific crimes defined in subsections (a)-(c), and that all other seeming elements may therefore be simply disregarded in assessing for triggering (or guilt?) purposes when the crimes defined in these subsections have been committed. On this view then, a defendant's "use or investment" of

confusion as courts attempt to decide what acts constitute "use or investment" in the "establishment or operation" of an enterprise. We are not persuaded by either of these arguments.

The virtue of uniformity cannot of course be gainsaid as a general matter, but it cannot in the end override statutory text which simply prevents it. To force uniformity here would fly in the face of the most trustworthy and predictable triggering rule for criminal prosecutions that we have, that the statute of limitations only begins to run from the date of the last act or occurrence required to complete a crime. *See Pendergast v. United States*, 317 U.S. 412, 418 (1943).[4] As indicated, while the crime defined in subsection (c) is complete upon the cessation of the pattern of racketeering activity *through* which an enterprise's affairs are being conducted, the offense defined in subsection (a) is only complete upon the use or investment of income, or its proceeds, derived from such a pattern. A prosecution under subsection (a) therefore could not proceed until such use or investment had occurred, without regard

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(Footnote continued from previous page)
income derived from the pattern of predicate acts which constitute the "already existing" crimes on which RICO is solely built is irrelevant to the question of when a subsection (a) offense has been committed.

Simply to parse this argument reveals that it seeks to make more of the quoted generalizations than they will bear, and perhaps that the generalizations themselves are ones that might bear rethinking or more cautious use.

[4]When the legislatively intended "unit of prosecution" under a criminal statute is a "course of conduct" rather than a "multiplicity of offenses" making up the conduct, *see United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-26 (1952), the limitations triggering event is perforce the concluding act in the course of conduct alleged. Subsection (a) plainly contemplates as its proper unit of prosecution a "course of conduct," *i.e.*, the "investment or use" of proceeds in the "operation" of an enterprise, rather than each separate act of investment or use. It is this feature which makes possible the charging here of acts of "use and investment" extending into the charging period.

to when the pattern of racketeering activity which produced the tainted income may have come to an end. The different structures of the offenses defined in these two subsections simply does not permit uniformity of treatment.[5]

Vogt's argument that such a triggering rule will produce confusion and be unenforceable focuses on the indeterminacy of the critical subsection (a) concepts of "use," "invest," "establishment," and "operation." The short and sufficient answer is that courts must necessarily interpret and apply those key concepts in resolving, or submitting for resolution, the issue of guilt itself under this subsection. Interpreting and applying them for limitation purposes poses no greater or different problem.

We therefore reject Vogt's contention that the district court erred in refusing to dismiss the indictment as facially time-barred.

(2)

Vogt's alternative contention is that, even if the prosecution was not facially time-barred under his theory of the applicable triggering event, it should have been found time-barred by the insufficiency of the evidence to prove an act of use or investment of tainted funds within the charging period. This contention has been attended by great confusion throughout the litigation process and that confusion persists on this appeal.

At trial, Vogt raised this issue in two ways. First, by motions at the close of the evidence and after verdict for judgment of acquittal for insufficiency of the evidence to support a finding of timeliness. Second, by requesting a jury

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[5]This is not the only respect in which uniformity of application of key RICO concepts as between subsections (a) and (c) has been found not warranted because of the different structures of the two subsections. *See Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-42 (4th Cir. 1990) (en banc) (while under subsection (c) a defendant and the enterprise must be separate entities, under subsection (a) they may be the same).

instruction requiring proof by the government of an act of investment or use within the charging period. Both were denied by the district court. The issue of the sufficiency of the evidence is clearly before us, having been properly raised in Vogt's main brief. The jury instruction issue is not clearly before us. There is a serious question whether it was properly preserved for review by a sufficiently specific objection at trial under Fed. R. Crim. P. 30. Beyond that, there is the further question whether, even if so, it has been properly raised on this appeal. It was not identified as an issue in Vogt's main brief, *see* Fed. R. App. P. 28(a)(2), but was only sought to be raised in rebuttal in his reply brief. This ordinarily will not suffice, *see* 9 J. Moore & B. Ward, *Moore's Federal Practice* ¶228.02[2.1] (1990), and we would be justified on this basis alone in declining to consider it as a separate issue.

In any event, we need not invoke procedural waiver, because we are satisfied that the same analysis which demonstrates the sufficiency of the evidence to support a finding of timeliness demonstrates that any error in refusing the requested instruction was harmless.

Vogt's argument is that there was insufficient evidence to support a finding beyond a reasonable doubt that any acts by him of use or investment of tainted funds or their proceeds occurred after January 5, 1982. He attempts to narrow this issue by seizing upon the government's identification of only three such specific acts in its brief, and then challenging weaknesses in the evidence related to each.[6]

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[6]The three transactions specifically instanced by the government were (1) the payment in October 1982 of the annual installment due on the Greensboro residence by attorney Ray in behalf of Real Tech Int'l, the then title-holder; (2) a March 1982 payment of an insurance premium due on properties titled to Real Tech Int'l; and (3) an April 1982 payment of hangar rent on an airplane purchased for Vogt's use but titled to Continental Aero Marine, Inc., another of the alleged enterprise corporations.

The government's imprecision in its brief may have invited this narrowly focussed challenge, but it obviously does not limit our assessment of the overall sufficiency of the evidence. Indeed, the government's brief simply instanced these as examples, "among other things," of acts of use or investment within the charging period. Appellee's Main Br. 23. Even if we were to put aside the three specific instances cited, we agree with the government that there is abundant evidence of "other things" occurring after January 5, 1982, to support a finding of timeliness.

Before identifying these, it will be helpful to recapitulate our earlier determinations respecting the sufficiency of the evidence to support findings of Vogt's culpable use or investment of tainted funds in connection with the general issue of his guilt. First, the sufficiency of the evidence to support a finding that Vogt derived substantial income from a pattern of racketeering activity between 1976 and 1978 is conceded. Next, there is no challenge to the sufficiency of the evidence to establish that the many transactions documented by the government's proof, including those within the charging period, actually occurred. We have now concluded that the evidence was sufficient to support the further critical inference from these conceded or unchallenged facts that the asset purchases and transfers effected in these transactions were effected directly by or in behalf of

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(Footnote continued from previous page)

Vogt's attack on these three is his general one that the evidence is insufficient to prove Vogt's control of these transactions rather than that of the corporate title-holder involved. He also attacks the last on the basis that the district court, considering related forfeiture issues without a jury, found the evidence not sufficient to prove beyond a reasonable doubt that Continental Aero Marine functioned as an element of the laundering enterprise.

While we believe, for reasons developed in text, that the evidence sufficed to support a finding of Vogt's direct control of each of these transactions, we also think them not necessary to support a finding of timeliness because of other transactions within the charging period.

Vogt, rather than by the various "enterprise" corporations acting independently of Vogt; that in these transactions the corporations were simply used as dummies or *alter egos* of Vogt specifically to conceal the source of his tainted funds; and that the funds and assets involved in all of the transactions proven were, at least in part, either income or the proceeds of income derived from the 1976-78 pattern of racketeering activity.

All of this of course applies to whatever transactions involving Vogt and different ones of the enterprise corporations were proven to have occurred after January 5, 1982, as well as before. We need point to only a few of the charging-period transactions.

In July of 1982, the Bluebird mobile home that had been bought and used by Vogt personally, but was titled to Costalotta, Inc., was sold by Vogt to Mitchell, who gave a cashier's check for $185,000 payable to Costalotta, Inc., which was then endorsed to and deposited by Real Tech Int'l in the Bank of Nova Scotia account.

In August of 1982, the Sea Ray motorboat that had been purchased in 1980 at a cost of $63,232 for Vogt's private use, but was titled to Real Tech Int'l, was sold by Real Tech Int'l to provide funds for Vogt.

In early 1983, the Greensboro residence to which Real Tech held title following Vogt's purchase of the property from Mitchell in 1979 was "sold" by Real Tech in a sham transaction to Vogt's parents.

These charging-period transactions, like various earlier ones, involved, as the jury necessarily found, "use" by Vogt of the "proceeds" of the originally tainted "income" in the "operation" of the multi-corporation laundering enterprise. On the government's sound theory of subsection (a)'s intended application, every time tainted funds or assets purchased with tainted funds were run into or out of one of the enterprise corporations by or at Vogt's direction, this

constituted a "use" by him of those funds or their proceeds in the "operation" of the enterprise in its intended function, which was precisely to serve as a concealing conduit or repository of the funds or assets.[7] Because, as indicated, Vogt has never disputed that these charging-period transactions occurred, the only basis upon which their conceded occurrence would not suffice as evidence of culpable conduct within the charging period is if the evidence were insufficient to support the further finding that they were acts of Vogt rather than of the corporation. As earlier concluded, the evidence overwhelmingly sufficed to support the jury's necessary finding that this repeated transactional pattern, whenever it occurred, involved Vogt as the prime mover, with the enterprise corporations serving as mere dummies or *alter egos* in their intended laundering function. We therefore conclude that the evidence sufficed to prove the timeliness of the prosecution by proving culpable acts of use or investment within the charging period.

The above analysis demonstrates that the only disputed factual issue respecting the occurrence of culpable conduct within the charging period was necessarily subsumed within the general issues going to Vogt's guilt. These were properly submitted to the jury and answered against

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[7]Vogt's challenge to the sufficiency of the evidence on this point is rested largely on an emphasis upon the narrowness of the concepts of "investment" of tainted funds in the "establishment" of an enterprise. This emphasis of course glosses over the obviously broader alternative concepts of the "use" of such funds in the "operation" of an enterprise. Both factual theories were charged and properly submitted to the jury. Focussing mainly on the limited notion expressed in the "investment" of funds alternative, Vogt argues technically that transactions in which enterprise corporations sold assets or transferred funds constituted "divestments" rather than "investments." As our discussion in text shows, this completely sidesteps the significance of such transactions as evidence of Vogt's "use" of tainted funds or the proceeds of those funds in the "operation" of an enterprise whose function was alleged and proven to be acting as repository or conduit for tainted funds in order to conceal their ultimate source and beneficial ownership.

Vogt on evidence sufficient to support the verdict. This either made unnecessary the submission of a special issue related to charging period occurrences, hence to the timeliness of the prosecution, *cf. United States v. Head*, 641 F.2d 174, 178 (4th Cir. 1981) (special instruction on timeliness of prosecution required where evidence leaves it in issue), or in any event made harmless any error in declining to submit such an issue.

C

Vogt's final argument respecting Count I is that the district court erroneously instructed the jury on the requirement that the government prove a "pattern of racketeering activity." We agree that the instruction was erroneous but hold that the error was harmless.

The court instructed the jury that it "need not find that there was any connection or relation between the racketeering acts," further instructing that the jury need "only find that the defendant . . . derived income from at least two of the charged racketeering acts committed within ten years of each other." Although this is clearly at odds with current law, *see Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 n.14 (1985) ("The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern."), it could not have made a difference on the facts of this case. The only predicate acts charged in the indictment were eight violations of 18 U.S.C. § 201(c)(3), which prohibits the receipt of bribes by public officials. All of the acts charged occurred between December 1976 and August 1978 and involved the same bribe payment transactions between the same parties—Vogt and Keidaish. Therefore, any pattern found by the jury must have been drawn from these obviously related acts. The court's erroneous instruction was therefore harmless.

IV

We next consider Vogt's several assignments of error respecting Count III, the *Klein* conspiracy count.

A

We take first an argument raised for the first time after submission of the case following oral argument. We decided to consider it, despite its belatedness, out of an abundance of caution, due to its fundamental nature, and invited supplemental briefing while holding the appeal in abeyance.

The contention is that Count III of the indictment is insufficient to state a crime under 18 U.S.C. § 371 which proscribes, in relevant part, "conspir[acy] either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose . . . ." Count III of the indictment charged that Vogt and others

> did conspire . . . to commit offenses against the laws of the United States by impeding, impairing, obstructing and defeating the lawful functions of the United States Department of the Treasury, Internal Revenue Service, in the ascertainment, computation, assessment and collection of revenue, that is, federal income taxes.

Section 371, though written as one criminal statute, proscribes two types of conspiracies. The first is a conspiracy to commit a substantive offense proscribed by other statutes. *See United States v. Vasquez,* 319 F.2d 381, 384 (3d Cir. 1983). The second, completely defined in § 371, is a conspiracy to defraud the United States. An indictment drawn under this latter portion of the statute need refer to no statute other than § 371.

The government's indictment in this case fails to refer to any other statute that Vogt allegedly conspired to violate,

and the government does not argue that the indictment was brought under § 371's first clause. Vogt argues that, because the indictment nowhere specifically states that the government was defrauded, the indictment was similarly inadequate under the "defraud" clause.

Vogt relies on *United States v. Hooker*, 841 F.2d 1225, 1230-31 (4th Cir. 1988), for the proposition that, lacking an essential element of the crime, this indictment does not support the exercise of jurisdiction over the prosecution. As noted, Vogt never raised this issue at any time during trial, and indeed not until several months *after* oral argument. *Hooker* and the other cases Vogt relies upon do not support his contention. In those cases, the defendant's challenges to the indictment all occurred pre-verdict and therefore triggered a stricter scrutiny of the indictment's sufficiencies. *See Hooker*, 841 F.2d at 1230; *United States v. Pupo*, 841 F.2d 1235, 1237 (4th Cir. 1988). *See also United States v. Zangger*, 848 F.2d 923, 924 (8th Cir. 1988). Indeed, each of the cited cases from this circuit expressly states that, had the defendant made a pre-verdict challenge to the indictment, the appellate court would have applied a different standard in assessing its jurisdictional sufficiency. *See, e.g., Hooker*, 841 F.2d at 1228-29; *Pupo*, 841 F.2d at 1239 ("As we stated in *Hooker*, when an indictment fails to include an essential element of the offense charged . . . a conviction under the indictment may not stand, provided the omission is timely raised . . . at any time prior to verdict.").

When a post-verdict challenge to the sufficiency of an indictment is made, "every intendment is then indulged in support of . . . sufficiency." *Finn v. United States*, 256 F.2d 304, 307 (4th Cir. 1958). The question then is "only whether 'the necessary facts appear in any form, or by a fair construction can be found within [its] terms.' " *Id.* at 306 (quoting *Hagner v. United States*, 285 U.S. 427, 433 (1932)). Where the post-verdict challenge to the indictment relates to the absence of an element, the indictment will be held

sufficient if it contains "words of similar import." *Id.* (emphasis deleted).

We conclude that Count III meets that liberal test. Count III alleges that the object of the conspiracy was

> impeding, impairing, obstructing and defeating the lawful functions of the United States Department of the Treasury, Internal Revenue Service, in the ascertainment, computation, assessment and collection of revenue, that is, federal income taxes.

J.A. 48-49. Further, the section of the indictment entitled "Methods and Means" sets forth the specific acts of alleged fraud, *viz.*, causing to be filed false tax returns as well as allegations of money laundering for the purpose of concealing income. *See,* J.A. at 49-50. A "fair construction" of the terms of the indictment charging Vogt with "impeding, impairing, obstructing and defeating" the Internal Revenue Service, when coupled with the specific allegations of money laundering and false tax returns, presented the " 'necessary facts . . . within [the] terms' of the [indictment] . . . to state an offense," *Finn,* 256 F.2d at 306-07 (citation omitted), under 18 U.S.C. § 371's defraud clause.

We therefore reject this belated challenge to the sufficiency of the indictment to charge an offense in Count III.

B

Vogt next contends that prosecution of Count III was time-barred. We disagree.

Klein conspiracies are governed by a six-year statute of limitations. *See* 26 U.S.C. § 6531(1) & (8); *United States v. White,* 671 F.2d 1126, 1133-34 (8th Cir. 1982). Therefore, assuming that the statute was tolled by the superseding indictment on January 5, 1987, and that a *Klein* conspiracy requires proof of an overt act in furtherance of the

conspiracy within the applicable six years, the government must have alleged and proven that Vogt committed an overt act in furtherance of the conspiracy after January 5, 1981. Vogt argues that such proof here is an impossibility because, under *Grunewald v. United States,* 353 U.S. 391 (1957), a *Klein* conspiracy's objectives are attained on the date the allegedly inaccurate tax returns are filed (or due if they are not filed)—in this case, on April 15, 1979. Any acts after that date, he contends, cannot have been "in furtherance" of the *Klein* conspiracy, but could only be in furtherance of an uncharged, separate, subsidiary conspiracy to conceal the object of the completed conspiracy. Under this reasoning prosecution for the *Klein* conspiracy is time-barred.

Vogt misconstrues *Grunewald.* As the Supreme Court later clarified in *Forman v. United States,* 361 U.S. 416, 422-24 (1960), *overruled in part on other grounds, Burks v. United States,* 437 U.S. 1, 17-18 (1978), the reasoning in *Grunewald* was tied to the indictment in that case which alleged that one object of the charged conspiracy was to conceal the acts of the conspirators. In essence then, the *Grunewald* indictment specifically charged a separate, subsidiary conspiracy. The *Forman* Court, however, considered an indictment that alleged a single, ongoing conspiracy to deprive the government of taxes—precisely like that charged in this case.[8]

> The petitioner says that the theory on which the case was submitted to the jury was that the

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[8]The indictment alleges that from January 1976 to June 1983 Vogt and others conspired "to commit offenses against the laws of the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service, in the ascertainment, computation, assessment and collectin of revenue, that is, federal income taxes." J.A. 48-49. In *Grunewald,* the indictment alleged that as part of the conspiracy, the defendants and co-conspirators would (1) "make continuing efforts to avoid detection and prosecution by any govern-

> conspiracy to attempt to evade the taxes "was consummated" when the income tax returns for 1945 were filed and that, unless the jury found "a subsidiary conspiracy" to conceal the conspiracy to attempt to evade the taxes, the "verdict would have to be not guilty." . . . The correct theory . . . was indicated by the indictment, i.e., that the conspiracy was a continuing one extending from 1942 to 1953 and its principal object was to evade the taxes . . . for 1942-1945 . . . by concealing their "holdout" income. This object was not attained when the tax returns for 1945 concealing the "holdout" income were filed. As was said in *Grunewald,* this was but the first step in the process of evasion. The concealment of the "holdout" income must continue if the evasion is to succeed. It must continue until action thereon is barred and the evasion permanently effected.

Forman, 361 U.S. at 423-24.

Contrary to Vogt's argument, the conspiracy charged in this case survives the tax return filing deadlines and the jury's verdict of guilty accordingly survives this challenge if the government showed an overt act in furtherance of this ongoing conspiracy within six years of the indictment. As discussed at length in Part III-B(2), the record abounds with evidence of overt acts by Vogt specifically designed to conceal his source of unreported income well into the six-year charging period.

C

Vogt's final argument concerning the *Klein* conspiracy is that the evidence at best sufficed to prove a conspiracy to

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mental body" and (2) "misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the acts done pursuant to and the purposes of said conspiracy." 353 U.S. at 394 n.3.

conceal the *source* of the unreported income, not a conspiracy to impede the IRS in the ascertainment and collection of income taxes upon it. We disagree.

We recognize, of course, that *Klein* applies only when an agreed upon objective of the criminal conspiracy is to thwart the IRS's efforts to determine and collect income taxes. *United States v. Krasovich,* 819 F.2d 253, 255-56 (9th cir. 1987); *United States v. Enstam,* 622 F.2d 857, 861 (5th Cir. 1980). If impeding the IRS is only a collateral effect of an agreement, rather than one of its purposes, then a conviction for a *Klein* conspiracy cannot stand. We conclude, however, that the evidence sufficed to support the jury's finding that one purpose of the conspiracy here alleged was to conceal the illegally gained income to avoid taxation.

A *Klein* conspiracy is comprised of three elements: "(1) the existence of an agreement, (2) an overt act by one of the conspirators in furtherance of the [agreement's] objectives, and (3) an intent on the part of the conspirators to agree, as well as to defraud the United States." *United States v. Shoup,* 608 F.2d 950, 956 (3d Cir. 1979). The offense comprehends " 'any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government.' " *Id.* at 964 (quoting *Dennis v. United States,* 384 U.S. 855, 861 (1966)). Although several courts have specifically reserved the question of whether conspiring merely to conceal the source of income is illegal under *Klein,* the same courts sustained *Klein* convictions because the evidence sufficed to prove an accompanying "intent and purpose of impeding and obstructing the IRS in the collection of revenue and the performance of its duties." *United States v. Montalvo,* 820 F.2d 686, 690 (5th Cir. 1987). *See also United States v. Browning,* 723 F.2d 1544, 1549 (11th Cir. 1984); *Enstam,* 622 F.2d at 863. The government's evidence in this case supports such a finding.

It shows that Vogt's federal income tax returns from 1976 to 1983 did not reflect any of the bribe monies he

received from Keidaish. The evidence also shows that from 1979 to 1983, Vogt acquired property interests in North Carolina and Florida and substantial assets, often placing title in various off-shore or domestic corporations, using large sums of cash, his attorneys' law firm's trust account checks, or official checks of off-shore banks. In 1978, when Vogt paid $100,000 cash in partial payment for a piece of property, he directed the seller to deposit the funds in less than $10,000 increments "[s]o there wouldn't have to be any banking forms filled out." Other evidence shows that Vogt and an alleged co-conspirator, through another trust account, paid monthly rental payments and insurance premiums on various enterprise assets. All of this evidence—inaccurate and false tax returns, other indications of tax evasion, and continuous concealment in a deceitful way—provides a sufficient basis for Vogt's conspiracy conviction. *See United States v. Tedder,* 801 F.2d 1437, 1446 (4th Cir. 1986). *See also Montalvo,* 820 F.2d at 690-91; *Klein,* 247 F.2d at 917.

One question, however, remains. To convict Vogt of participating in a *Klein* conspiracy, the government must also show *an agreement* between Vogt and at least one other to impede the IRS. *United States v. Mulherin,* 710 F.2d 731, 737 (8th Cir. 1983); *United States v. Anderson,* 611 F.2d 504, 511 (4th Cir. 1979). Vogt argues that his conviction for participation in the *Klein* conspiracy must fall because all of the co-conspirators named in the indictment were acquitted on the conspiracy count, and the government cannot therefore prove the requisite agreement. We do not agree. As we recently held in *United States v. Thomas,* 900 F.2d 37, 40 (4th Cir. 1990) (citing *United States v. Andrews,* 850 F.2d 1557, 1561 (11th Cir. 1988) (en banc)), even where all but one of the charged co-conspirators are acquitted, the verdict against the one may nevertheless stand. As noted in *Thomas,* recent decisions, including a number of Supreme Court decisions, have effectively undercut the old common law rule which protected criminal defendants against

conviction on an "inconsistent" verdict. Sufficient protection against "jury irrationality or error" is now considered to lie in "independent review of the sufficiency of the evidence.' " *Thomcs*, 900 F.2d at 40 (quoting *Andrews*, 850 F.2d at 1562). Here, sufficient evidence exists of a conspiracy between Vogt and his acquitted co-conspirators to uphold the jury's verdict against Vogt.

We therefore reject Vogt's argument that his conviction on Count III should be overturned because his co-conspirators were acquitted on that count.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA GREENSBORO DIVISION

ORDER

UNITED STATES OF AMERICA

v.

DAVID JACK VOGT, JR., WILLIAM CARL RAY, and BURTON R. LEVEY

Cr-86-199-01-WS
Cr-86-199-02-WS
Cr-86-199-03-WS
(Filed Feb. 24, 1987)

BULLOCK, District Judge

Defendant Vogt has moved the court to dismiss Counts One and Two of the indictment as time barred under the five-year statute of limitations, 18 U.S.C. § 3282. Defendants Levey and Ray have adopted that motion as their own. Defendants' argument essentially is that the acts which constituted the substantive RICO violation and the RICO conspiracy respectively charged in those counts took place five years before the return of the indictments. A review of the indictment and the RICO case law makes clear, however, that the crimes charged fall squarely within the limitations period.

Count One charges a violation of 18 U.S.C. § 1962(a). The gravamen of § 1962(a) is *use or investment* of income derived from a pattern of racketeering activity in the acquisition of any interest in, or the establishment or operation of any enterprise affecting interstate commerce.

Defendants argue that the commission of the last "racketeering act" triggers the period of limitations, and says that racketeering acts are defined under "racketeering activity" in 18 U.S.C. § 1961(1) as the individual crimes

there listed. Sections 1962(a) does not outlaw these already-outlawed crimes, however, but instead prohibits the use of money derived from those acts in the operation of any interstate enterprise. *United States v. McNary,* 620 F.2d 621 (7th Cir. 1980). This use or investment of racketeer funds in the establishment or operation of an enterprise under § 1962(a) is to be distinguished from conducting the affairs of an enterprise through racketeering activity under § 1962(c). In the former, racketeering acts could be unrelated to the enterprise and have occurred years earlier, *id.* at 628; in the latter, racketeering acts are the means by which the enterprise does its business, and are contemporaneous with its operation, *United States v. Turkette,* 452 U.S. 576, 583-84 (1981). If an enterprise violating § 1962(c) stops its racketeering activity, it is arguable that the last "racketeering act" sets the statute of limitations to running. This is not the case with § 1962(a), which looks to the use of racketeer funds and not to the acts which generated them.

It is the last such use or investment in an enterprise, then, that triggers the statute of limitations. As the indictment alleges that the last such use of racketeer-derived funds was in February 1983, and as the indictment was brought in January 1987, it is clear that the statute was satisfied. Given this result, the court need not decide whether continued operation of an enterprise once funded by racketeer monies is a continuing violation of the RICO statute.

Count Two, charging conspiracy to use racketeer funds in the establishment or operation of an interstate enterprise, is also not time-barred by the same rationale. Under § 1962(d), the gravamen of the offense is agreement to violate the RICO statute, whether (1) by use or investment of racketeer funds in an interstate enterprise, (2) by acquiring or maintaining control of an interstate enterprise through racketeering activity, or (3) by conducting or participating in the conduct of an interstate enterprise's

affairs through a pattern of racketeering activity. 18 U.S.C. § 1962(a)-(c). The enterprise need never be formed or existing, nor need the racketeering activity ever take place, as long as there was an agreement to do these things. A RICO conspiracy does not require the commission of an overt act to violate the statute. *United States v. Coia,* 719 F.2d 1120 (11th Cir.), *cert. denied,* 446 U.S. 973 (1983); *United States v. Barton,* 647 F.2d 224 (2d Cir.), *cert. denied,* 454 U.S. 857 (1981). Consequently, such a conspiracy ends, and the limitations period therefore begins, not when the last overt act was committed, but when the agreement ceased. *United States v. A-A-A Electrical Co.,* 788 F.2d 242, 245-46 (4th Cir. 1986); *Coia,* 719 F.2d at 1124; *United States v. Castellano,* 610 F. Supp. 1359 (S.D.N.Y. 1985). Acts in furtherance of a conspiracy may logically be used to show circumstantially that the agreement continued into the statute of limitations period. *Coia,* 719 F.2d at 1125.

Here, the government alleged both that the actual conspiratorial agreement continued into 1983, and that an overt act in furtherance of the conspiracy took place in February of that year. Such allegations are clearly sufficient to bring the conspiracy charged within the statutory limitations period.

For the foregoing reasons, IT IS ORDERED that Defendants' motion to dismiss Counts One and Two as time barred be, and the same hereby is, DENIED.

FRANK W. BULLOCK, JR.
United States District Judge

February 24, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

MEMORANDUM OPINION

UNITED STATES OF AMERICA

v.

DAVID JACK VOGT, JR.

Cr-86-199-01-G
(Filed Dec. 24, 1987)

BULLOCK, District Judge

Defendant David Jack Vogt, Jr., was charged in the first three counts of a four-count superseding indictment handed down on January 5, 1987, which also named Burton Robert Levey and William Carl Ray as defendants. Count One alleged that Vogt violated 18 U.S.C. § 1962(a) by knowingly and willfully investing or using income or proceeds derived directly or indirectly from a pattern of racketeering activity in an enterprise engaged in or affecting interstate commerce. The predicate racketeering activity alleged was multiple violations of 18 U.S.C. § 201(c)(3), to wit, knowingly, intentionally and corruptly receiving and agreeing to receive things of value in return for doing or omitting to do acts in violation of his official duty as an officer of the United States Customs Service. Count Two alleged that Vogt conspired with Levey and Ray to violate 19 U.S.C. § 1962(a). Count Three alleged that Vogt conspired with Levey, Ray *and others* to violate 18 U.S.C. § 371 by "impeding, impairing, obstructing and defeating the lawful functions" of the Internal Revenue Service in ascertaining, computing, assessing and collecting federal income taxes.

The indictment also alleged that by virtue of violating Section 1962 Vogt and Ray were subject to the criminal

forfeiture provisions of 18 U.S.C. § 1963(a)(1), (2), and (3), and described several items allegedly forfeitable.

The evidence presented by the government in the case, consistent with its theory of prosecution, established that Defendant Vogt, after accepting bribe money from drug smugglers in exchange for confidential customs service information, concealed this money through the use of off-shore accounts, domestic and off-shore corporations, and the utilization of the law firm trust accounts of his Florida and North Carolina attorneys, co-defendants Levey and Ray, and invested the money in acquiring assets in Florida, North Carolina, and elsewhere. After a trial which continued for almost three months, the jury returned a verdict on June 18, 1987, finding Vogt guilty of Counts One and Three. The jury acquitted Vogt on Count Two and acquitted Levey and Ray on all applicable counts.

Having been convicted of violating Section 1962 Vogt is subject to the criminal forfeiture provisions of Section 1963(a). Vogt knowingly and voluntarily agreed to a bench trial on the forfeiture issue, thereby waiving his right to a jury determination under Rule 31(e) of the Federal Rules of Criminal Procedure. Vogt has been awaiting sentence pending the court's determination as to forfeiture.

Defendant requested that the court make specific findings of fact on the forfeiture issue. Based on the evidence produced at trial the court deems the findings of fact set out below to have been established by proof beyond a reasonable doubt. In any trial of this length, however, involving ninety witnesses and approximately 500 exhibits, it is not possible to enumerate every shred of evidence supporting each finding; the court, in making references to specific evidence supporting the findings below, does not suggest that the evidence enumerated is exclusive, and that there are not additional facts and circumstances leading to the same finding or conclusion.

FINDINGS OF FACT

I. *Background*

A. The Bribes

1. From 1971 to early 1979 Defendant David Jack Vogt, Jr., was employed by the United States Department of the Treasury as a customs official for the United States Customs Service in the south Florida area.

2. Defendant first met Philip Frederick Keidaish in May 1974 when Defendant arrested Keidaish on a sojourn violation for illegally taking an ex-military aircraft out of the country.

3. Beginning sometime after the sojourn arrest in 1974 Keidaish and Vogt became friends, during a time when Keidaish was involved in an extensive smuggling operation involving numerous flights bringing multiple ton loads of marijuana into the United States from South America.

4. Beginning sometime after the sojourn arrest in 1974 and continuing until late 1978 Keidaish made cash payments to Vogt in United States currency approximately seven times, averaging in excess of $100,000.00, in exchange for information from Vogt pertaining to Customs Service surveillance and "watch lists" of suspected drug smugglers.

5. Keidaish and his associates, including Theodore DeLisi, his partner in several smuggling flights, used the information Defendant provided in making their arrangements to import marijuana from South America by plane, and at least twice relied on Defendant's information in changing plans.

6. Keidaish testified credibly about the smuggling operation, his leadership role in it, and his bribery of Vogt. The court credits Keidaish's testimony, and when considered along with that of Theodore DeLisi, James Wilson,

Harry Hill, James DeVon, and others, finds that it establishes beyond a reasonable doubt that Vogt received substantial cash bribes from the Keidaish smuggling organization in exchange for supplying confidential information to Keidaish.

B. Tracing the Racketeering Income — Defendant's Use of Off-Shore Accounts and Attorneys' Trust Accounts

1. Burton R. Levey was and is an attorney in Miami, Florida, and during the 1970's and early 1980's was a partner with Leonard Levenstein and others in the four-to-six-person law firm of Levey, Levenstein, Cowan & Rubenstein. Levey represented Philip Keidaish in a variety of legal matters during the 1970's, and incorporated several off-shore corporations in the islands for Keidaish. Levey represented Keidaish in purchases of assets through off-shore corporations including land in Polk County, Florida, purchased in the name of a Netherlands Antilles corporation, Worthington, N.V. Keidaish also owned airplanes which he held in corporate names. Keidaish did not hold assets in his own name because he did not want to report assets in excess of his income to the Internal Revenue Service, and thus presented himself as an "agent" of certain corporations rather than as the owner. Keidaish laundered money through off-shore bank accounts and the Levey law firm trust account in an attempt to hide assets derived from ilicit income.

2. Leonard Levenstein did a substantial amount of corporate work through off-shore corporations and banks for Theodore DeLisi, Keidaish's partner in some of his smuggling operations. Levenstein personally took illegal money, accompanied by Levey on at least one occasion, to the Bank of Nova Scotia in Freeport, Bahamas, for Theodore DeLisi. The law firm often wire transferred funds from the Bank of Nova Scotia back into the firm trust account. Substantial illegal income passed through the

Bank of Nova Scotia and into the Levey, Levenstein firm trust accounts.

3. The Levey, Levenstein, Cowan, Rubenstein firm trust account was with Pan American Bank of Miami during at least the second half of 1979 until at least through March 1980. By May of 1980 and continuing through at least August 1981 the firm trust account was with First City Bank of Dade County, Florida.

4. Keidaish introduced Vogt to Levey in March 1979 with respect to a problem Defendant had with title to an airplane. Beginning on March 21, 1979, and continuing at least through April 23, 1980, Levey performed a variety of legal work for the Defendant. While there is no evidence that Levey directly established off-shore corporations and accounts for Vogt, Levey assisted Vogt in transactions involving such off-shore corporations and accounts.

5. Darryl Myers is an attorney in Grand Cayman, British West Indies, and the evidence presented at trial established beyond a reasonable doubt that Darryl Myers was an unindicted co-conspirator in many of the money-laundering activities alleged in the indictment. The trust account for Myers' law firm, McDonald, Myers & Co., was with the Bank of Nova Scotia in the Cayman Islands. Keidaish and Vogt were acquainted with Myers.

6. Vogt spoke on numerous occasions about off-shore corporations, about doing consulting work for off-shore corporations, and about putting money into off-shore corporations and bringing it back into the country later. In January 1981 Vogt, Keidaish, Ray Pringle, Jr., and James E. Hodges went to the Cayman Islands, where they went to the Bank of Nova Scotia and Keidaish and Vogt met with officers of the bank from 30 to 45 minutes. Keidaish and Vogt also met with Myers in the Caymans on at least one other occasion. Defendant was also in the Caymans from

July 14-July 17, 1977, on vacation from his position with the Customs Service.

7. From January 31, 1980, through December 19, 1980, Mary Anne Vogt, wife of Defendant, received cashier's checks from the Bank of Nova Scotia, Georgetown, Grand Cayman, Cayman Islands, B.W.I., on a monthly basis, all in the amount of $3,000.00, and deposited each in the joint personal bank account held by her and Defendant.

8. Guiness Mahon Bank is a Cayman Island bank. Mary Anne Vogt received checks dated November 26, 1981, and November 27, 1981, drawn on the Guiness Mahon Cayman Trust Limited account through Irving Trust in New York for $4,000.00 each, which she deposited on separate days in the Vogt joint personal account.

9. Defendant received two checks from the Guiness Mahon Cayman Trust Limited account through Irving Trust dated July 23, 1981, both in the amount of $4,000.00, and three checks from the same account dated February 2, 1982, all for $4,000.00, all of which he deposited separately in the joint personal account.

10. Defendant received a check from the Guiness Mahon Cayman Trust Limited account through Irving Trust dated October 27, 1981, and one dated January 14, 1983, both for $4,500.00, and deposited each in the joint personal account.

11. Defendant was familiar with the regulations promulgated under the Currency and Foreign Transactions Reporting Act, 31 U.S.C. § 5313, 31 C.F.R. §§ 103.22, 103.23, concerning cash transactions or transportation of cash or monetary instruments.

12. The name James M. Owens was an alias used by Vogt. In July 1982 Vogt, as James Owens, endorsed and cashed a check dated July 14, 1982, made out to "cash" in the amount of $50,000.00 drawn on the Guiness Mahon

Cayman Trust Limited account through Irving Trust Company.

13. William Carl Ray, a co-defendant in this case, was and is an attorney in Greensboro, North Carolina. The trust account for his law firm, Walker, Dowda, Ray & Warren, was with Wachovia Bank & Trust Company, N.A., in 1980 and continuing at least through 1982. From no later than January 1981 until at least March 1983 Ray represented Vogt and corporations with which Vogt was affiliated in several matters.

14. William Carl Ray's uncle, Herb Robinson, resides in El Paso, Texas. On September 3, 1982, Vogt, using the James Owens alias, took delivery of a 1982 34-foot Airstream trailer, purchased for $40,856.50 from Land Yacht Trailer Sales in El Paso, Texas. Land Yacht Trailer Sales would also hold mail for Vogt ("Owens") which would be picked up periodically for Defendant by Herb Robinson.

15. The bulk of the purchase price for the trailer was paid by check dated August 2, 1982, drawn on the Guiness Mahon Cayman Trust account through Irving Trust, to Land Yacht Trailer Sales in the amount of $40,000.00, which check was sent by the MacDonald, Myers & Company law firm.

16. The Airstream trailer was sold on November 9, 1984, through Land Yacht Trailer Sales to Harrison King, and Defendant received a total of $32,000.00. Defendant received partial cash payments from Land Yacht in increments of less than $10,000.00 on January 21, 22, 23, 24, and February 5 and 8, 1985. When deposited, these cash payments of less than $10,000.00 did not require the bank to report them under the Currency Transaction Act.

C. The Colonial Manor Apartments

1. In July 1978 Defendant and his wife, represented by their friend Marshall Nance, were introduced to Harvey

G. Mitchell, Jr., a motor vehicle dealer, and the owner of the Colonial Manor Apartments in Greensboro, North Carolina. Nance was also a close friend of Mitchell, and had in fact been more like Mitchell's stepbrother, Nance's father having reared Mitchell in the Nance home during his teenage years. Nance knew that Mitchell was looking for a buyer for the apartments, and that the Vogts were interested in such a purchase.

2. In November 1978 the Vogts agreed to purchase Colonial Manor from Harvey Mitchell for a tentative total price of $797,253.36. This price included intended assumption of the first deed of trust held by Aetna Life Insurance Company in the amount of $607,659.58, and a second deed of trust held by Planter's Bank in an approximate amount of $165,000.00. Planter's Bank held second and third mortgages on Colonial Manor which were in default and were in the process of being foreclosed at the time of the purchase.

3. Mitchell personally received approximately $25,000.00 from the Vogts from their legitimate assets, and another $100,000.00 in cash "under the table" for Colonial Manor. In crediting Mitchell's testimony concerning the $100,000.00 under-the-table payment, the court finds it entirely consistent with Mitchell's well-established method of doing business throughout his business career, a career typified by tax evasion and falsified financial reporting.

4. Planter's second mortgage totaling $178,418.83 including principal, interest, and collection expenses was paid off on January 15, 1979, by a check in the amount of $174,104.18 dated January 11, 1979, from Chardon, N.V., a Netherlands Antilles corporation represented by Darryl Myers, drawn on the Bank of Nova Scotia in the Cayman Islands, and $4,314.65 in cash paid by Defendant.

5. Defendant "borrowed" the $174,104.18 from Chardon, N.V., and represented Chardon in the transaction with Planter's Bank.

6. Defendant refused to supply Aetna Life Insurance Company or Wachovia Bank & Trust Company with personal financial statements, and therefore never technically assumed the first deed of trust; however, Defendant made the regular monthly payments and thus avoided foreclosure.

7. From March 20, 1979, to August 26, 1980, Defendant's wife wrote out monthly checks to Chardon, N.V., in the amount of $2,411.50, drawn on the Colonial Manor account with First Citizen's Bank.

8. Monthly rental income from the Colonial Manor Apartments averaged between $9,000.00 and $17,000.00. Defendant reported rental income for December 1978 of $9,275.00 and expenses other than depreciation of $12,064.00 for a loss of $2,789.00.

9. Defendant paid the manager of Colonial Manor a monthly fee of $600.00 from January of 1979 through February 1980, and $700.00 from March 1980 through September 1980 by checks drawn on the Colonial Manor account.

10. Defendant spent large sums of money fixing up the apartments. From February 19, 1979, to August 13, 1980, Defendant wrote checks on the Colonial Manor account for maintenance totaling at least $35,850.00

11. In 1979 Defendant reported a loss for rents, etc., which, excluding straight line depreciation, totaled $5,110.00. In 1980 Colonial Manor rents less expenses, excluding depreciation, totaled $16,305.00.

12. Even if the Colonial Manor rents covered expenses, they provided little additional income to the Vogts. Defendant's legitimate funds were very limited during the time period, and some of the money he spent on Colonial Manor apartments was derived from the bribes paid by Keidaish.

13. Evidence of Defendant's access to funds is the purchase of Philip Keidaish's lavish house in Ft. Lauderdale, Florida, on August 1, 1980, by Mary Anne Vogt, financed ostensibly with approximately $60,000.00 from the sale of the Vogts' modest residence and a $124,000.00 purchase money mortgage payable to Mrs. Keidaish. The court credits Philip Keidaish's testimony that he sold his home to the Vogts for approximately $200,000.00 to obtain quick cash for his $180,000.00 bail. Further evidence of Defendant's access to funds before his resale of Colonial Manor is established by his purchase of a 1980 Cadillac from Harvey Mitchell on March 21, 1980, for which he paid $13,283.48 cash. In neither of these transactions was a corporate shield used.

14. On November 13, 1980, Defendant and his wife sold the Colonial Manor Apartments to Carolina Landmark Corporation for $1,425,000.00. Chardon, N.V., through Darryl Myers, was paid $158,524.34, extinguishing the second deed of trust, which money went into Myers' firm trust account. Aetna received $563,077.00, including the prepayment penalty in satisfaction of the first deed of trust. The Vogts received a check in the amount of $652,964.05, dated November 13, 1980.

15. After the sale of Colonial Manor, the Vogts had reported income from bank accounts and dividends ranging from $64,868.00 in 1981 to $25,713.00 in 1983, indicating substantial savings and investments. From 1981 to 1983 most of the interest income reported to the IRS was in "island accounts."

II. *The Enterprises*

A. Chardon, N.V.

1. Chardon, N.V., is a Netherlands Antilles corporation and was at times a client of Burton Levey's law firm. Defendant had substantial interaction with Chardon, N.V., but it is not established beyond a reasonable doubt that

Defendant invested or used his racketeering income in or through Chardon.

2. Defendant financed a substantial portion of the purchase price of the Colonial Manor Apartments with a January 1979 "loan" from Chardon, N.V., a Netherlands Antilles corporation represented by Darryl Myers and for whom Defendant was allegedly an agent, as set out above.

3. On August 1, 1979, Chardon, represented by Levey and by Defendant as "loan officer," lent $50,000.00 to Harvey Mitchell which loan was secured by a second mortgage on Mitchell's residence on Groometown Road in Greensboro, North Carolina. Chardon did not require Mitchell to fill out an application for the loan, nor to submit financial information.

4. A check in the amount of $50,000.00, made out to Mitchell, dated July 10, 1979, and drawn on the Bank of Nova Scotia was endorsed to and deposited in the Levey firm trust account. The loan proceeds passed by a check dated August 8, 1979, in the amount of $48,531.00 drawn on Levey's firm trust account with Pan American Bank. The endorsement in the name of Harvey Mitchell on the Bank of Nova Scotia check was not written by Mitchell.

5. In September 1979 Mitchell negotiated through Defendant for a loan from Chardon in the amount of $310,000.00, which Mitchell was to use to purchase what ultimately became Mitchell Olds-Cadillac, Inc., in Burlington, North Carolina. The promissory note was to be secured by a second lien on the Groometown Road property, and the loan was to close by November 15, 1979. Defendant and Mitchell entered into a collateral agreement by which Defendant would retain ten per cent (10%) of the stock of the dealership as a "finder's fee."

6. At closing, Defendant and Levey demanded that Mitchell take out a $500,000.00 "key man" life insurance policy, to which Defendant personally was to be the

beneficiary. Mitchell and his attorney refused this request and the loan was not finalized.

7. Levey's law firm client file for Vogt includes an entry for the $50,000.00 Chardon loan to Mitchell for the Groometown Road property, and for the proposed $310,000.00 loan for the Olds-Cadillac agency.

B. Real Tech International Ltd.

1. Real Tech International Ltd. is a Cayman Island corporation engaged in interstate commerce, and was a client of Burton Levey's Law firm. It is established by proof beyond a reasonable doubt that Defendant Vogt was the actual owner of Real Tech International Ltd. and put funds derived from his racketeering activity into the corporation.

2. Defendant used Real Tech International Ltd. to buy assets for his own use or for investment purposes, including Harvey Mitchell's Groometown Road residence in Greensboro, two Mercedes automobiles, and a Sea-Ray boat.

3. As originally negotiated, Real Tech was to be the lender of the $50,000.00 to Harvey Mitchell on the Groometown Road property. Also, a check in the amount of $350,000.00 dated November 19, 1979, a few days after the proposed $310,000.00 loan to Mitchell fell through, drawn on the Levey firm trust account, named Real Tech as payee and was endorsed for Real Tech by Darryl Myers.

4. The evidence established that on November 7, 1979, Mitchell sold his residence on Groometown Road in Greensboro, North Carolina, to Real Tech International Ltd., controlled by the Defendant, for approximately $172,170.00. Mitchell advised his attorney that the sale price was only $130,000.00.

5. Mitchell received a check in the amount of $5,878.21 drawn on the Levey law firm trust account and

Real Tech assumed the existing deed of trust and the second mortgage held by Chardon, N.V.

6. Mitchell continued to live in the house until 1982. On April 7, 1981, Mitchell entered into an agreement with Defendant under which Mitchell had a one-year option to repurchase the Groometown Road property. Defendant signed the agreement in his own name, not as a representative of Real Tech. The terms of the option included paying Defendant extra interest and required Defendant to pay the taxes and insurance.

7. Levey's client file for Defendant includes purchase of the Groometown Road property by Real Tech. Insurance on the property remained in Mitchell's name until 1981, but from March 24, 1981, to February 28, 1983, the house was insured in the name of Real Tech in care of William Ray, but the policy was taken out by Defendant and was listed by the insurance carrier under Defendant's name. The personal umbrella policy taken out in the name of Mary Anne Vogt through William Ray for the period September 8, 1981, to September 8, 1983, included mention of a residence in Greensboro, North Carolina.

8. Additional evidence of Defendant's personal ownership of the Groometown Road property is the credible testimony of William Snouffer that Defendant offered to sell the property to him for $180,000.00 cash. In December 1981 Darryl Myers, signing as president of Real Tech, gave William Ray legal power of attorney to sell the Groometown Road property. On December 21, 1982, Real Tech passed a corporate resolution to sell the property. In early 1983 the property was sold in a sham transaction to Defendant's parents for $55,000.00 and assumption of a deed of trust in the amount of $72,170.69 in favor of the Federal Land Bank of Columbia, said loan still being in the name of Harvey Mitchell.

9. Defendant also purchased two Mercedes for the

use of his wife and himself in the name of Real Tech with illicit income. Defendant and his wife were the true owners of the vehicles.

10. On February 8, 1980, Harvey Mitchell, through his dealership Burlington Dodge, sold a 1979 Mercedes 450 SEL to Real Tech International for $29,800.00 (excluding tax). This vehicle was ordered by Vogt in October 1979, paid for in November 1979, and kept at Mitchell's Groometown Road property from October 1979 to February 1980, when it was titled to Real Tech at Vogt's direction. A North Carolina title for the vehicle was applied for on February 8, 1980, in Defendant's name as president of Real Tech.

11. On February 18, 1980, Mitchell, through Mitchell Olds-Cadillac acquired a 1980 Mercedes 450 SL upon Defendant's request for his wife for $33,543.00 and titled it to Real Tech International. Defendant's name and telephone number were on the purchase order, and on February 19, 1980, Defendant applied for a North Carolina title for the vehicles signing as agent of Real Tech. Both vehicles had been prepaid by Defendant through a check dated November 6, 1979, on Burton Levey's firm trust account in the amount of $115,232.20, which also represented an additional payment for the Groometown Road property.

12. Both Mercedes were insured by Penn General under a policy originally listed in the name of Defendant for Real Tech and later changed to Real Tech in care of Levey. The only drivers listed on the policy were Defendant and his wife. Philip Keidaish testified that the Defendant admitted the cars were his, but stated that he had concealed the true ownership to avoid the "high profile" about which Keidaish expressed concern.

13. On November 24, 1980, Real Tech "sold" the two Mercedes to Mary Anne Vogt for $22,000.00 and $28,000.00 for the SEL and SL respectively. She paid Real Tech by checks drawn on the Vogts' joint personal account with Gulf

Stream Bank, which were endorsed to McDonald Myers & Co. by Darryl Myers signing for Real Tech. These "purchases" by Defendant's wife were in effect paper transactions.

14. On January 18, 1980, Real Tech International ordered, and on February 6, 1980, purchased, a 1980 Sea Ray motorboat for $63,232.00 from Uphoff Marine Sales.

15. The purchase was financed with money drawn from the Levey law firm trust account with Defendant signing as agent for Real Tech. Defendant was in fact the owner of the boat and the purchase was made with money derived from Defendant's racketeering activities.

16. Levey's client file for Defendant includes an entry for Real Tech's purchase of the boat, and Levey applied for a Florida title in the name of Real Tech. Repair orders from Uphoff Maine Sales list Defendant as the customer. Mary Anne Vogt's umbrella policy includes a listing of the Sea Ray under Real Tech.

17. Defendant at various times took friends out on the boat, and Rick Steelman testified credibly that in August 1980 he saw the boat at Defendant's residence. Steelman also testified that during the summer of 1982 William Ray mentioned the prospect of selling the Sea Ray to him, saying that Vogt needed money or would lose his assets.

18. As a director of Real Tech, Darryl Myers gave Ray power of attorney over the Sea Ray. On August 16, 1982, Real Tech through Ray transferred the boat to Arthur Campagna.

C. Silver Realty Corporation

1. Silver Realty Corporation was a North Carolina corporation formed on May 17, 1979, by Burton Levey and Prentice-Hall, Inc., and engaged in interstate commerce. Silver Realty was to have been called Real Tech of North

Carolina, but the name Real Tech was not available in North Carolina. Silver Realty Corporation was a North Carolina subsidiary of Real Tech International.

2. Silver Realty Corporation was owned and controlled by Defendant and Defendant put funds derived from racketeering activity into the corporation. Silver Realty was a client of Burton Levey's law firm. Defendant obtained a lock box as agent for Silver Realty in Greensboro for the period August 23, 1979, to September 1, 1981. On December 3, 1980, insurance coverage for the two Mercedes was changed from Real Tech's policy to a policy in the name of Silver Realty. In notes to Mary Anne Vogt's umbrella policy, Silver Realty is listed as being owned by Real Tech.

3. In July 1978 Defendant told Harvey Mitchell he would like to have an FMC motor home. Mitchell located the motor home in Wisconsin, and Defendant and his wife flew to Greensboro, North Carolina, from Florida with $32,000.00 in cash to purchase it.

4. Mitchell originally titled the FMC to Burlington Leasing Company, and then on September 22, 1978, to Burlington Dodge (both owned by him) at Defendant's direction.

5. Defendant was the actual purchaser and owner of the FMC motor home and purchased it with funds derived from his racketeering activity. Silver Realty was created in part to hold title to the FMC for Defendant. Insurance on the FMC through Penn General agencies was in Defendant's name in June 1979 and Defendant and his wife were listed as drivers. Defendant obtained the vehicle for his personal use, and at least on one occasion in May 1979 drove it to the Colonial Manor Apartments.

6. In 1979 Defendant advised Harvey Mitchell that he wanted a tow vehicle to use with the FMC motor home, and on June 7, 1979, Burlington Dodge, Inc., which Mitchell owned, sold a 1979 Jeep CJ7 to Silver Realty. Defendant

paid the purchase price in cash on June 7, 1979, and applied for a North Carolina title on behalf of Silver Realty. This vehicle was owned by the Defendant and was purchased with funds derived from Defendant's racketeering activity.

7. The 1979 Jeep was damaged when it became separated from the FMC while the Vogts, Harvey Mitchell, and Marshall Nance were on the way to the North Carolina coast. On October 4, 1979, Defendant transferred the damaged Jeep back to Burlington Dodge, in exchange for a 1980 Dodge Omni. The Omni was delivered and titled to Marshall Nance at Defendant's instructions. Silver Realty did not receive anything in exchange for the 1979 Jeep.

8. On February 8, 1980, Silver Realty purchased a 1980 Jeep CJ7 from Burlington Dodge for $8,247.20 (excluding tax). Defendant picked up the Jeep and instructed Mitchell to bill it to Silver Realty. This vehicle also belonged to the Defendant, not as agent for Silver Realty but personally, and its purchase represented a use or investment of income derived from his racketeering activity.

9. North Carolina title for the 1980 Jeep was applied for on February 8, 1980, with Defendant's name signed as president of Real Tech. Defendant at various times was seen driving the FMC with the Jeep behind it. Invoices for Silver Realty's insurance police and for Real Tech's policy went to Burton Levey, and were listed under Defendant's name.

10. On March 18, 1981, Silver Realty transferred title to the FMC and the 1980 Jeep to Hicone Motors, with Defendant's name signed for Silver Realty. Hicone Motors is a used car dealership in Greensboro operated by Robert C. Robinson, a cousin of William C. Ray.

11. Also on March 18, 1981, Hicone Motors transferred the FMC and the 1980 Jeep to William C. Ray for $12,330.00 and $4,500.00 respectively. Robinson did not participate in the transfers and did not pay or receive any

money in any of the transactions, and Ray signed Robinson's name. Ray used the Knoxville, Tennessee, address of an apartment he had rented and titled the vehicles in Tennessee.

12. The sales to and purchases from Hicone Motors were paper transactions intended to clear the title to the vehicles.

13. On August 24, 1981, Ray assigned title to the FMC to Mitchell Olds-Cadillac. On October 29, 1981, Mitchell Olds-Cadillac sold the FMC to Charles Green of Virginia Beach, Virginia, for $33,000.00.

D. Costalotta, Inc.

1. Costalotta, Inc., is a North Carolina corporation engaged in interstate commerce formed on July 30, 1981, by one of William C. Ray's law partners at his request. Ray was listed as and signed as president of Costalotta.

2. Defendant owns Costalotta, Inc., and used or invested funds derived from his racketeering in or through Costalotta, Inc.

3. On August 24, 1981, William C. Ray sold the 1980 Jeep CJ7, previously transferred from Silver Realty to Hicone Motors to Ray, to Costalotta, Inc., for $5,600.00

4. The 1980 Jeep was purchased by Defendant for his personal use. Ben David Smith, a flight instructor, testified credibly that Mary Anne Vogt picked him up, along with the Defendant, at the Ft. Lauderdale, Florida, airport in the Jeep. Defendant, using his "James Owens" alias, also used the Jeep to pass the driver's test for a Tennessee license on January 29, 1982.

5. On July 19, 1982, William C. Ray repurchased the 1980 Jeep from Costalotta.

6. In mid-July 1981 Defendant ordered a 1981 Bluebird Wanderlodge Motor Home from Mitchell Olds-

Cadillac. Down payment was made by check in the amount of $20,000.00 dated July 23, 1981, and drawn on the Guiness Mahon Cayman Trust Limited account through Irving Trust.

7. At the instructions of William C. Ray, Harvey Mitchell crossed out Defendant's name on the receipt and replaced it with Costalotta, Inc., which was not chartered until a week later.

8. The Bluebird was purchased and owned by Defendant for his own use, with funds derived either directly from his illegal activity, indirectly through funds generated from the sale of Colonial Manor Apartments, or both.

9. On December 10, 1981, Mitchell formally purchased the Bluebird to sell to Defendant and put Defendant's name on his bookkeeping entry. On December 23, 1981, Costalotta purchased the 1981 Bluebird for a total price of $206,121.80, including the previous $20,000.00 down payment, and the receipt was made out to Costalotta and the Defendant.

10. Mitchell received the remaining $186,000.00 by a check dated December 7, 1981, drawn on the Bank of Nova Scotia in the Cayman Islands, and deposited it on December 15, 1981.

11. William C. Ray applied for a North Carolina title for the Bluebird, signing as president of Costalotta.

12. Defendant and his wife made extensive use of the Bluebird, including stays at campgrounds in Tennessee and in El Paso, Texas, in 1982.

13. At Defendant's request, Harvey Mitchell ordered a new mobile telephone for the Bluebird on March 9, 1982, and Defendant signed his own name as customer.

14. On the Penn General insurance policy which covered the Bluebird and the 1980 Jeep in the name of

Costalotta, the two Vogts were listed as the only drivers. The Bluebird was added to Costalotta's insurance policy on December 18, 1981, and Penn General cancelled the insurance as to the Bluebird at Defendant's written request on July 13, 1982, after Defendant informed the carrier that the Bluebird had been sold.

15. In June 1982 Defendant asked Mitchell to repurchase the Bluebird.

16. On July 1, 1982, William C. Ray as president of Costalotta assigned title back to Mitchell Olds-Cadillac.

17. On July 2, 1982, Harvey Mitchell drove to a campground in Georgia where he met the Vogts and Ray and gave Vogt a cashier's check in the amount of $185,000.00 made out to Costalotta.

18. The cashier's check was assigned by special endorsement from Ray as president of Costalotta to Real Tech and was deposited in the Bank of Nova Scotia account.

19. On August 16, 1982, Leith Leasing purchased the Bluebird from Mitchell Olds-Cadillac. On September 27, 1982, Mitchell delivered another check from Mitchell Olds-Cadillac to Costalotta in the amount of $18,000.00 for the balance of the repurchase price.

20. When Defendant, as "James Owens," purchased the Airstream trailer from Land Yacht Trailer Sales he told the seller that he had previously owned a Bluebird.

E. Continental Aero-Marine, Inc.

1. Defendant began flying airplanes in the 1960's. On May 2, 1978, Marshall Nance formed Continental Air Services, Inc., a Florida corporation, for Defendant and named Defendant as majority shareholder. The purpose of Continental Air Services was to purchase an airplane and to be a liability shield.

2. Holding an airplane in a corporate name as a

liability shield is a common and even recommended practice, even if, as is often the case, the plane is for personal use.

3. In 1978 Continental Air Services purchased a 1965 S-35 Beechcraft airplane for Defendant's use.

4. On May 11, 1979, William C. Ray and Rick Steelman, a salesman for Piedmont Aviation, flew from Winston-Salem, North Carolina, to Florida in a Beechcraft A-36 Bonanza to meet Defendant and discuss buying the airplane. Defendant told Steelman that he could not afford to purchase the plane at that time.

5. In April 1980 Steelman again discussed selling an A-36 Beechcraft Bonanza to Defendant and on April 18, 1980, Defendant ordered a 1980 model from Piedmont Aviation. Throughout the correspondence between Beechcraft (the manufacturer) and Piedmont Aviation (the seller) Defendant is referred to as the customer without mention of any corporation.

6. On May 13, 1980, Continental Aero-Marine, Inc., was incorporated in North Carolina by William C. Ray at Burton Levey's request.

7. On September 17, 1980, Piedmont Aviation sold a 1980 Beechcraft Bonanza to Continental Aero-Marine, Inc., for $122,500.00 plus trade-in of the 1963 S-35 Bonanza owned by Continental Air Services. The 1980 plane was registered in the name of Continental Aero-Marine.

8. Defendant told Rick Steelman that the deposit had to be in the form of a trade-in because Defendant would not have the cash until he sold some apartments. Defendant was the actual owner of the 1965 Beechcraft S-35 and merely held it in the name of Continental Air Services. Continental Air Services was involuntarily dissolved in December 1980 for failure to file an annual report.

9. The $122,500.00 balance for the purchase of the

1980 A-36 was paid by check dated September 10, 1980, on Burton Levey's firm trust account.

10. A Bank of Nova Scotia cashier's check dated August 18, 1980, in the amount of $125,000.00 was deposited in the Levey firm trust account on August 22, 1980.

11. Defendant requested a special registration number including his initials, "N9DV," in December 1980.

12. The 1980 A-36 was purchased and owned by the Defendant and used exclusively by him.

13. Insurance on the airplane was through the Penn General agency and Defendant was listed as the pilot. Defendant told both Philip Keidaish and Harvey Mitchell that he had bought a new airplane.

14. Defendant received flight instruction in the new plane from Ben David Smith, paid cash for his flight time, and did not retain the receipts.

15. From October 1980 to December 29, 1981, Defendant made at least thirty-four (34) recorded flights in the A-36, N9DV, including twenty (20) between September 18, 1981, and October 16, 1981. Most of the flights during that period were local and instructional flights, but Defendant flew to Georgia at least twice, to Knoxville, Tennessee, and to El Paso, Texas.

16. Defendant, using the name "Jim Owens," leased a hangar for N9DV at El Paso International Airport from April 16, 1982, to July 8, 1982.

17. During the spring of 1982 Rick Steelman was told by William C. Ray to try to sell N9DV because Defendant needed money. In early 1982 William Snouffer was also told by William C. Ray that Defendant was selling his airplane and the Bluebird because he was afraid of being indicted in Florida.

18. On July 2, 1982, Ray and Steelman flew to an airport in Georgia and met Defendant, at which time Steelman received keys to the hangar in El Paso, Texas. On July 3, 1982, Continental Aero-Marine sold N9DV to Ray Breeden of the Breeden Company, Inc., for $128,000.00. Steelman went to El Paso, Texas and got the plane out of the hangar and flew it to Norfolk, Virginia, to deliver to Breeden.

19. N9DV was subject to a security agreement in the amount of $122,500.00 held by Trans-Canadian Aero-Marine, Inc., for which Levey was trustee. This lien was paid off on July 3, 1982, by a cashier's check from Breeden in the amount of $122,500.00, which was deposited by Darryl Myers in the Guiness Mahon Cayman Trust Ltd. account.

20. Trans-Canadian Aero-Marine, Inc., is not alleged in the indictment to be an enterprise corporation. Although likely controlled by the Defendant, the government's evidence does not establish beyond a reasonable doubt that Defendant used funds derived from his illicit activities to fund the purchase of N9DV through Trans-Canadian Aero-Marine, Inc.

21. Evidence presented at trial establishes only that Continental Aero-Marine was incorporated by a partner of William C. Ray and that the corporation received a check in the amount of $5,500.00 from Ray Breeden which was deposited by William C. Ray. Such evidence is not inconsistent with a legitimate loan to Continental Aero-Marine from Trans-Canadian Aero-Marine, possibly an independent, separate lender controlled by Darryl Myers.

DISCUSSION

I.

Defendant contends that the forfeiture allegations included in the indictment fail to satisfy Federal Rule of

Criminal Procedure 7(c)(2) with respect to Count One because the allegations appear beneath Count Two and therefore do not notify Defendant that conviction on Count One will subject him to forfeiture.[1] Since Defendant was acquitted on Count Two and he had insufficient notice of forfeiture as to Count One, Defendant argues that his assets should not be forfeited.

The court does not accept this argument. The essential purpose of Rule 7(c)(2) is "to provide persons with adequate notice of the extent to which forfeiture is sought." *United States v. Amend*, 791 F.2d 1120, 1125 (4th Cir.), *cert. denied*, 107 S. Ct. 399, 93 L. Ed. 2d 353 (1986). The indictment included a section entitled "Forfeiture Allegations" which began with the statement: "1. The Grand Jury realleges Counts One and Two of the indictment in their entirety for the purpose of alleging forfeitures," under 18 U.S.C. § 1963.

This statement is sufficiently clear to notify Defendant of the government's allegations. First, the Fourth Circuit has ruled that incorporation by reference can be sufficient notice to satisfy Rule 7(c). *United States v. Caldwell*, 544 F.2d 691, 695 (4th Cir. 1976) (the indictment does not have to be "model of written clarity" to be legally sufficient). Secondly, the fact that the section immediately followed the listing of the overt acts evidencing the Count Two conspiracy should not have misled Defendant, particularly since it also immediately preceded Count Three, to which forfeiture does not apply. Placement of the forfeiture allegations between Counts Two and Three was logical, since they constituted a lengthy list applicable to the two preceding counts but not to the count which followed. Finally, the "open file" policy in this district gave Defendant adequate notice of the government's intention to seek forfeiture. *Amend*, 791 F.2d at 1125.

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[1]Rule 7(c)(2) provides: "No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture."

The court restricts its consideration of forfeiture to the assets included in the indictment. Since the government declined to pursue the general descriptions of items in allegations 2(j) and 2(k) of the indictment at the forfeiture hearing, any items solely within those categories will not be considered for forfeiture. Because the remainder of the items are adequately described a bill of particulars is unnecessary.

The government alleged forfeiture pursuant to 18 U.S.C. § 1963(a)(1), (2), and (3). The version of Section 1963 applicable at the time of Defendant's offense contained only two subsections under Section 1963(a). Although the court recognizes that the 1984 revision substantially altered the language of the provision, the court rejects Defendant's contention that the earlier version applicable here did not provide for seizure of substitute assets. *See United States v. Russello*, 464 U.S. 16, 26 (1983) (fact that revision of Section 1963 explicitly includes profits and proceeds does not mean prior version did not include them). The new version simply clarified the existing coverage with respect to such assets. *Id.* (amendment is in response to narrow readings which the Court now rejects). This court also rejects Defendant's claim that application of the forfeiture provisions as alleged amounts to a violation of the constitutional prohibition against *ex post facto* laws. *See* U.S. Const. art. I, § 9, cl. 3. The statutory provisions in effect at the time of Defendant's criminal offense will be applied, without any change in the quantum of punishment.

II.

As part of that punishment Section 1963(a) (as it existed prior to 1984) requires forfeiture of:

> (1) any interest he has acquired or maintained in violation of Section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has

established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962.

18 U.S.C. § 1963(a) (1970).

18 U.S.C. § 1962 contains the substantive criminal provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). RICO forfeiture under section 1963(a) is *in personam* not *in rem, United States v. Ginsburg*, 773 F.2d 798, 800 (7th Cir. 1985), *cert. denied*, 735 U.S. 1011 (1986); *United States v. L'Hoste*, 609 F.2d 796, 813 n.15 (5th Cir.), *reh'g denied*, 615 F.2d 383, *cert. denied*, 449 U.S. 833 (1980), which means that the emphasis is on penalizing the wrongdoer by separating him from his ill-gotten benefits, rather than on confiscating "guilty" items. *United States v. Russello*, 464 U.S. at 28; *Ginsburg*, 773 F.2d at 802. Because Section 1963 is predicated on Section 1962, however, only those benefits achieved through violation of one of the provisions of Section 1962 can be forfeited.

In this case Defendant was accused and convicted of violating only subsection (a) of Section 1962, which provides that:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a) (1970).

The act of receiving racketeering-related income is not

sufficient to constitute this offense. Therefore, Defendant does not forfeit the money he received from Keidaish solely on the basis of it being bribe money, because at that time he had not committed a RICO violation. As a United States Customs Officer his receipt of money in exchange for violating his duty was the criminal act defined by 18 U.S.C. § 201(c), and since Defendant did so more than once during the 1970's he is a "person who has received any income derived . . . from a pattern of racketeering activity," *see* 18 U.S.C. §§ 1961(1)(B) and (5). In order to amount to a violation of Section 1962(a), however, Defendant must have thereafter used or invested some part of that income in an enterprise engaged in or affecting interstate or foreign commerce, and the forfeiture provisions of Section 1963(a) will apply only to those parts of such income that he so used or invested.

RICO forfeiture is not limited to interests which the Defendant acquired in an "enterprise," however. Although several courts have construed Section 1963(a) in the past in a way which requires forfeiture only of such ownership interests, *United States v. Marubeni Am. Corp.*, 611 F.2d 763 (5th Cir. 1977); *United States v. McManigal*, 708 F.2d 276 (7th Cir.), *vacated*, 464 U.S. 979, *modified*, 723 F.2d 580 (7th Cir. 1983); *United States v. Thevis*, 474 F. Supp. 117 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982); *United States v. Meyers*, 432 F. Supp. 456 (W.D. Pa. 1977), the United States Supreme Court has expressly overruled those decisions and has made it clear that the restrictive definition of "interest" applies only to Section 1963(a)(2), which refers to "any interest *in*." *Russello*, 464 U.S. at 21 (emphasis added). Subsection (a)(1) does not address just "interests in" but "any interest," and the Court has construed this broadly to cover virtually any property interest, including the right to profits and proceeds. *Id.* Therefore, the forfeiture provisions apply to any item or property interest which bears the requisite connection to an "enterprise," and which Defendant acquired or

maintained with tainted funds, as well as to the profits or proceeds from disposition of such interests.

Although *Russello* involved a violation of Section 1962(c), *i.e.*, racketeering activity carried out through an enterprise, rather than a post-racketeering use or investment of tainted funds, the forfeitable interests under both subsections (c) and (a) should include profits and proceeds. The difference between the two subsections lies in the timing of the violation. Subsection (c) is violated during the conduct of the racketeering activity and thus "profits and proceeds" refers to any monies made through the racketeering. In contrast, at the time Defendant engaged in racketeering activity (*e.g.*, taking the bribes) no enterprise is alleged to have existed, and hence RICO had not yet been violated. The RICO offense occurred when the racketeering-derived funds were invested, and forfeiture is only a consideration as of that time. From that point onward, however, the effect of Section 1963 on subsections (c) and (a) are the same, and profits and proceeds derived from forfeitable interests should also be forfeitable.

Moreover, once the Section 1962(a) violation is proven, it should not make any difference whether the interest Defendant thereby obtained still exists. In *United States v. Ginsburg*, the Seventh Circuit expressly rejected Defendant's contention that the government must prove existence of the interests or proceeds at the time of conviction. 773 F.2d at 800. The court reasoned that because criminal forfeiture is *in personam*, the sanction follows defendant personally regardless of how he decides to spend or squander the profits. *Id.* at 801. To hold otherwise would defeat the purpose of the forfeiture provisions as recognized by the Supreme Court in *Russello* (to separate the racketeer from his ill-gotten gains, 464 U.S. at 28) by permitting Defendant to use money he should not have had. *Ginsburg*, 773 F.2d at 802. Also, limiting forfeiture to existing tainted interests would allow the Defendant to escape the economic

sanction by living lavishly and expending the funds on short-term benefits, *e.g.*, "wine, women and song." *Id.*

The *Ginsburg* court carried this reasoning further in ruling not only that the government is not restricted to recovering specific proceeds, but also that once a violation is shown the government need not even trace the proceeds beyond that point. *Id.* at 802.

> [W]hile the government's interest in the profits or proceeds of racketeering activity does not *attach* until conviction, its interest *vests* at the time of the act that constitutes the Section 1962 violation and cannot subsequently be defeated, as far as Section 1963(a)(1) is concerned, if the defendant dissipates or transfers away the proceeds subject to forfeiture.

Id. at 801 (emphasis in original); *see also United States v. Navarro-Ordas*, 770 F.2d 959, 969-70 (11th Cir.) (court can enter what amounts to a personal money judgment, order forfeiture of the amount and place the burden of satisfying the order on the defendant, regardless of what he did with the profits), *reh'g denied*, 776 F.2d 1057 (1985) *cert. denied, Rodriguez v. United States*, 475 U.S. 1016 (1986).

Thus, the Seventh Circuit concluded that Section 1963(a)(1) requires neither tracing of proceeds nor proof of present existence, because to do so would "render the statute . . . a virtual nullity," *id.* at 802, and defeat the intent of criminal forfeiture. The Fourth Circuit found *Ginsburg* persuasive, and followed it in ruling that "the government need not have offered evidence that the forfeitable assets were still in existence at the time of . . . conviction." *United States v. Amend*, 791 F.2d at 1127, n.6. The court follows the lead of the Fourth Circuit and accepts the *Ginsburg* reasoning.

The "relation back" doctrine, that the government's interest vests at the time of the Section 1962 violation,

excuses this court from following the tainted funds after Defendant used or invested them in or through an "enterprise," and permits a finding that the entire amount of such use or investment is forfeitable. However, because the Section 1962(a) violation occurs only when income derived from racketeering is so used or invested, and not at the time of the racketeering activity itself, the court must trace tainted funds from the bribes to the uses or investments.

III.

The government seeks forfeiture of the proceeds from Defendant's sale of the Colonial Manor Apartments. Such proceeds are not forfeitable, however, despite Defendant's investing of at least $100,000.00 of income derived from racketeering in the apartment complex. Although some transactions related to real estate have been found to affect interstate commerce, *see Goldfarb v. Virginia State Bar,* 421 U.S. 773, 783 (1975) (title examinations); *United States v. Nerone,* 563 F.2d 836, 850-51 (7th Cir. 1977) (rental of pieces of real estate for mobile homes); *United States v. Romano,* 523 F. Supp. 1209, 1210 n.4 (S.D. Fla. 1981) (investment of tainted funds in an inn), *rev'd on other grounds,* 736 F.2d 1432 (11th Cir. 1984), the law is not clear that purchase of a residential apartment complex in one's own name constitutes investment in an enterprise relating to interstate commerce, in violation of Section 1962(a). Moreover, the government did not allege the Colonial Manor Apartments to be an "enterprise" and thus cannot assert Defendant's investment of tainted funds in Colonial Manor to be a RICO violation subjecting the funds to forfeiture.

This does not mean that the substantial Colonial Manor proceeds are entirely beyond the reach of Section 1963. Those proceeds are still "income derived . . . indirectly, from a pattern of racketeering activity" and subsequent use of investment of the proceeds in an "enterprise" is a Section 1962(a) violation.

To construe the language of Section 1962(a) otherwise would oppose logic and the broad legislative purpose underlying RICO. *See Russello,* 464 U.S. at 27. Although RICO forfeiture is intended to apply solely to racketeering income or its proceeds which are put into or drawn from interstate or foreign commerce, the government's reach should not be abridged by intervening investment of tainted funds in non-enterprise assets, any more than it would be by letting the racketeering income sit in a bank account before investing in an "enterprise."

In *United States v. McNary,* 620 F.2d 621 (7th Cir. 1980), one of the few circuit court cases involving Section 1962(a), the Seventh Circuit reasoned that the words "directly or indirectly": "demonstrate that the statute contemplates situations in which racketeering monies will not be directly or immediately employed to establish or operate interstate enterprise." 620 F.2d at 628.

Immediate or direct use is not required to violate Section 1962(a), and it need not be the illicit income which is ultimately invested; proceeds of such income is sufficient. *Id.* To require otherwise would render the statute ineffectual where defendants used surreptitious accountings and other vehicles designed to thwart tracing, and would thereby defeat the "liberal purpose of the RICO act." *Id.*

Although the Seventh Circuit did not reach the forfeiture issue in *McNary,* clearly if indirect investment of the proceeds of racketeering activity constitutes a Section 1962(a) violation then any interest acquired or maintained thereby shall be forfeited.

To summarize the effects of Section 1962(a), Defendant must forfeit the value of all of the interests he acquired or maintained by using or investing racketeering income or its profits or proceeds. Because all of the Colonial Manor proceeds can be considered to be "derived . . . indirectly from" Defendant's racketeering activity (insofar as without

the tainted $100,000.00 he would not have bought the apartments and made the profits), whatever amount of such proceeds can be traced into an "enterprise" will be forfeitable.

Under Section 1963(a)(2), Defendant must also forfeit any existing interest he has in "enterprises." There is case law which suggests that this might include offices or positions he holds in such enterprises, *United States v. Rubin*, 559 F.2d 975, 990-92 (5th Cir.) (forfeiture of offices currently held is proper), *reh'g denied*, 564 F.2d 98 (1977), *reh'g denied*, 572 F.2d 320, *vacated on other grounds*, 439 U.S. 810 (1978), *on remand*, 591 F.2d 278, *cert. denied*, 444 U.S. 864 (1979); *United States v. Thevis*, 474 F. Supp. 117, 144 (N.D. Ga. 1979) (voting rights or management contract may be subject to forfeiture if afford source of influence over the enterprise); however, since the government did not seek surrender of any such positions, and in light of the prison sentence to be imposed on Defendant, such forfeiture is inapplicable.

IV.

Only those assets obtained by the use or investment of funds in or through an enterprise engaged in interstate or foreign commerce are forfeitable. Corporations may be or may together comprise an "enterprise" for RICO purposes. 18 U.S.C. § 1961(4). Therefore, to the extent Defendant used funds derived from the bribes to purchase assets in a corporate name (a practice which can be characterized as investing in the enterprise) the amount of funds so used, or the existing assets, are forfeitable.

Defendant represented himself as an agent of several corporations including Chardon Company, N.V., Real Tech International, Ltd., Silver Realty Corp., Cestalotta Inc., and Continental Aero-Marine, Inc. The evidence shows (1) that Defendant purchased assets through four of these corporations and (2) that he did so for the personal use of he and his

wife. Moreover, with the exception of the A-36 Bonanza, the acquisitions were made with funds directly or indirectly traceable to the bribe payments from Keidaish.

The second point, that the assets in question were for the use of Defendant and his wife, is undeniable. The evidence is clear that the two Mercedes titled to Real Tech, the FMC and both Jeeps originally purchased by Silver Realty, and the Bluebird acquired by Costalotta, as well as the A-36 Bonanza held by Continental Aero Marine, were ordered and/or purchased upon the express request of or statement of interest by Defendant. Also, the insurance policies for each vehicle list Defendant and/or his wife as the principal and exclusive drivers. Credible evidence demonstrates that at least occasionally Defendant used these assets, plus the 1980 Sea Ray titled to Real Tech, for the entertainment of friends, including Harvey Mitchell, Rick Steelman, Marshall Nance, and William Snouffer. Further, Defendant's name usually arose with respect to repairs and transactions involving the vehicles. Defendant used the 1980 Jeep to pass his Tennessee driving test in January 1982 under the alias "James Owens," and his wife used it to pick up Defendant and Ben David Smith at the Ft. Lauderdale airport.

The first point, that the Defendant and not the corporation was the actual purchaser of the vehicles, is also heavily supported by circumstantial evidence. Usage of these assets taken individually might not be inconsistent with the characterization of Defendant as a representative or employee of these corporations. Company cars and other assets as well may be made available for an employee's exclusive use and in such cases the agent would likely be listed as the principal driver and would be the one to have the repairs made. However, consideration of all of the circumstances in evidence in this case does not permit such a finding but instead logically compels the conclusion beyond a reasonable doubt that Defendant in effect pur-

chased and owned these assets, and that at his direction they were held in the various corporate names.

To begin with, within a span of ten days (February 8 to 18, 1980), Real Tech purchased two Mercedes, and put both of them at Defendant's disposal. While the court might attribute provision of one Mercedes as a company car merely to unusual corporate munificence, the court finds the notion that a corporation would give an agent a second luxury car to be used by the agent's spouse wholly unbelievable. Such profligacy demonstrates a subordination of corporate well-being to the lifestyle of its agent that strongly suggests that the agent and the corporation are one and the same, or at least that the former controls the latter.

This suspicion is heightened by the fact that on the day Real Tech purchased the 1979 Mercedes for Defendant's use, Silver Realty purchased a 1980 Jeep CJ-7, also for the use of Defendant. Both purchases were made from Burlington Dodge which was owned by Defendant's aforementioned friend, Harvey Mitchell, whom Defendant met when he bought Colonial Manor Apartments. Mitchell, a motor vehicle dealer, proved to be an ideal ally for Defendant's cash purchases and attempted concealment of ownership of several vehicles. Since the evidence solidly supports a finding that Silver Realty is a subsidiary of Real Tech, the court must wonder why related corporations would provide the same agent with two and then three company vehicles, unless the agent is pulling the strings.

As if this were insufficient largess, both Real Tech and Silver Realty had already provided recreational vehicles for Defendant's use. Two days prior to purchase of the first Mercedes, Real Tech purchased a 1980 Sea Ray motor boat which Defendant kept at his Ft. Lauderdale home. The 1980 Jeep replaced a 1979 model which had been damaged in the course of an outing Defendant and friends made to the North Carolina coast. The Jeeps, in turn, were acquired

because Defendant wanted a vehicle to tow behind the FMC which Silver Realty provided him.

The circumstances surrounding acquisition of the FMC provide additional support for the conclusion that Defendant was using the corporations merely as holding companies for his acquisitions, as well as suggesting that he had something to hide. Although Defendant paid cash for the FMC in the summer of 1978, the coach was not titled to Silver Realty until May 18, 1979, and in fact Silver Realty was not incorporated until May 7, 1979. This not only indicates that Defendant purchased the FMC personally, but coupled with the fact that prior to May it had been titled to Mitchell's dealership at Defendant's request, it shows both that Defendant did not want his ownership of the FMC known and that Silver Realty was created to hold title for Defendant.

The disposal of the 1979 Jeep also indicates Defendant's control over corporate assets. After the Jeep had been damaged Defendant returned it to Mitchell in exchange for a 1980 Dodge Omni. The Omni was not titled to Silver Realty, the legal owner of the Jeep; rather it was delivered to Marshall Nance, who had no affiliation with Silver Realty but was a friend of both Defendant and Mitchell. This informality about corporate property is inconsistent with the position of Silver Realty as a separate entity.

Two other instances impugn the independent status of Silver Realty's Cayman Island parent, Real Tech, as well. The first is that nine months after Real Tech purchased the two Mercedes it sold them to Defendant's wife at a considerable discount. The second concerns the Groometown Road property in Greensboro. Not only did Mitchell enter into the option agreement with Defendant personally, rather than as an agent for Real Tech, but in 1983 after Mitchell had moved out, the corporation sold the property to Defendant's parents for an amount well below the apparent value. Passage of assets to Defendant's closest relatives at

bargain prices is significant evidence that the transactions were not effected at arm's length, and that Defendant controlled their disposition. Moreover, the fact that both Mercedes were titled to Defendant's wife affords support for finding that Real Tech was used in order to clear title to the cars.

Connections between Defendant and the corporations also extend to Costalotta Inc. First, the court heard credible testimony linking Defendant to Costalotta. Also, substantial evidence supports a finding that the extravagant Bluebird was acquired in the name of Costalotta at the request and for the exclusive use of Defendant. In fact, as with the FMC, the corporation which ultimately "purchased" the Bluebird was not formed until well after the order had been placed. This again suggests that the corporation was created to hold the asset for Defendant, a practice which is not unusual regarding recreational vehicles or motor homes. In addition, the Bluebird was sold half a year later because Defendant needed cash and was afraid of being indicted.

Another connection between Defendant, Costalotta, and the other corporations is the chain of title to the 1980 Jeep. Specifically, in March 1981 Silver Realty, a North Carolina corporation, passed title to both the Jeep and the FMC to Hicone Motors, a Greensboro dealership operated by a cousin of Defendant's North Carolina attorney William Ray. On the same day Hicone sold the vehicles to Ray for a fraction of their value. Ray performed the transaction for both sides and used the address of a Knoxville apartment which he leased just prior to and throughout that time but did not live in.

In addition to these suspicious circumstances, on August 24, 1981, Ray assigned title to the FMC to Mitchell's dealership, which later resold it for $20,000.00 more than Ray had paid, and Ray sold the Jeep to Costalotta. While it was titled to Costalotta, Defendant and his wife used the

Jeep and then in July of 1982, a time when Defendant needed money and was concerned about indictment, Costalotta sold it back to Ray. These machinations, like Mary Anne Vogt's purchase of the Mercedes, were paper transactions intended to clear title to the Jeep and the FMC, and prevent discovery of Defendant's considerable holdings.

Despite efforts to conceal his interests, Defendant was the actual owner of the assets held in corporate solution. The court cannot accept as reasonable the proposition that four or five different corporations, at least some of which were related and newly formed, would make him their agent at roughly the same time and would satisfy his every whim with extravagant purchases. The formal structure collapses under the weight of repeated coincidence, connection, and adverse testimony.

In order for Defendant to forfeit the assets, however, the government had to prove not only that the assets were purchased through, or represented investment in, the corporations, but also that the funds involved were traceable to the bribes Defendant received. The court is convinced beyond a reasonable doubt that Defendant received bribe payments from Philip Keidaish between 1974 and 1978 inclusive, in violation of 28 U.S.C. § 201(c)(3). Defendant's financial situation as reflected on his and his wife's joint tax returns for the years prior to 1980 do not reflect receipt of such sizable sums. Their reported income could not support extravagant purchases and their legitimate savings was similarly too modest to fund the numerous acquisitions by the involved corporations.

The evidence already discussed compels the conclusion that Defendant did in fact purchase these assets through the corporations for his own use. Again it is wholly unbelievable that entities not owned and controlled by Defendant would expend substantial corporate funds to provide an agent with such expensive vehicles, and allow bargain sales or gratuitous disposition of their assets to the

agent's family and friends, especially when the agent represents several corporations at one time. The logical conclusion therefore is that, since Defendant's legitimate net worth would not permit him to make such purchases, since he had an illegal source of substantial funds, and since he did in fact make those purchases, the acquisitions were made at least in part with tainted funds.

That Defendant had to use the illegitimate funds to make such purchases is more certain in light of the various acquisitions Defendant and his wife also made in their own names prior to the sale of Colonial Manor. These include the purchase and funding of Colonial Manor itself, for which the over-the-table down payment would have virtually exhausted their legitimate savings. They also obtained Keidaish's lavish Ft. Lauderdale home, ostensibly for a purchase money mortgage, but the payments on such mortgage would be substantial regardless. Finally, in addition to the company cars available to Defendant, he and his wife also purchased for cash a 1980 Cadillac de Ville in early 1980. Certainly prior to the November 1980 sale of Colonial Manor Defendant's legitimate financial situation would not have permitted all of these purchases.

The court realizes that its analysis is based in large part on circumstantial evidence of Defendant's purchases and control, and on evidence of his net worth with respect to tracing of the racketeering income. Circumstantial evidence may be sufficient for conviction, however, particularly where the situation suggests an effort to avoid creation of direct evidence, such as by use of false names, straw men, or foreign banks, *United States v. Parness*, 503 F.2d 430, 436 (2d Cir. 1974) (absence of direct evidence in RICO case is neither surprising nor conclusive; circumstantial evidence is sufficient for conviction, especially in light of efforts to conceal use of funds and a scheme concocted to avoid suspicion), *cert. denied*, 419 U.S. 1105 (1975), all of which were present here. Similarly, though the court should not

rely exclusively on evidence of net worth in tracing illicit proceeds, such evidence can be considered. *United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1981) (evidence that defendant had no other sources of legitimate income shows that plane was purchased with proceeds of illegal enterprise).

In this case the conclusion drawn from evidence of Defendant's net worth is supported by substantial circumstantial evidence relating to off-shore accounts. First, Defendant was familiar with several Caribbean islands, including the Cayman Islands, and had contact with Darryl Myers and the Bank of Nova Scotia. Second, the government elicited credible testimony that Defendant was familiar with the process of setting up off-shore corporations and was taking money off-shore. Third, the Levey, Levenstein law firm which Defendant often employed had numerous dealings in the islands, regularly transferred funds from off-shore banks, and Levenstein admitted taking tainted money off-shore for Keidaish. Fourth, after Defendant sold Colonial Manor he kept the bulk of the savings in "island accounts" as listed on his tax returns.

A final factor is that several of the purchases involving Defendant, which were made either in corporate solution or in Defendant's name, were made with funds taken directly or indirectly from off-shore accounts (with either Guiness Mahon or the Bank of Nova Scotia) and which passed through the firm trust accounts of Myers, Levey, Ray, or some combination thereof. These include the purchase of Colonial Manor with Chardon funds, payment for the Bluebird by a Bank of Nova Scotia check, a cashier's check from Bank of Nova Scotia to Levey to pay for the A-36 Bonanza, and acquisition of an Airstream trailer by James Owens by check drawn on Guiness Mahon. Many of the other purchases (the FMC, the Jeeps) were made in cash, sometimes on behalf of newly-formed or even not-yet-formed corporations controlled by Defendant.

Similarly, proceeds of sales from many of the assets, including the A-36 Bonanza and the Bluebird, as well as the money "paid" by Mary Anne Vogt for the two Mercedes, were eventually deposited back into island accounts. There are two additional connections between the islands, the tainted funds, and the corporate purchases controlled by Defendant. One is the transfer of $350,000.00 to Real Tech from the Bank of Nova Scotia immediately following the breakdown of negotiations for the $310,000.00 Chardon loaned to Mitchell, which loan would have come from Chardon's or its representative Myer's Bank of Nova Scotia account. Second is the check to Costalotta for the proceeds from sale of the Bluebird. Myers, presumably as agent for Costalotta, endorsed the check over to Real Tech before depositing it in the Bank of Nova Scotia.

The conclusion compelled by all of this evidence is that the tainted funds were put into off-shore accounts and drawn down through attorneys' client trust fund accounts to purchase assets on behalf of the corporations. Although due to island policies the identities of all corporate directors and account holders were not available, the immense body of circumstantial evidence nevertheless overcomes all reasonable doubt about Defendant's participation in the corporate acquisitions and the source of the corporate funds.

The exception to the proof beyond a reasonable doubt concerns the A-36 Bonanza. The evidence makes it obvious that the plane in fact belonged to Defendant and was merely held in a corporate name, possibly for liability purposes. Much of this evidence, such as the leasing and use of a hangar in El Paso under the name Jim Owens and the fact that Defendant created a dummy corporation to hold the asset, lends additional support to the court's other conclusions. However, the court cannot draw the conclusion that Defendant put tainted funds into the corporation to purchase the plane. There is credible testimony that Defendant was hesitant to obtain a new plane prior to

selling his apartments and also that he sold the A-36 in 1982 because he needed money. The former suggests that Defendant waited until he received the proceeds of the Colonial Manor sale and then used them in part to acquire the plane, while the latter casts some doubt upon the separateness of the lienholder, Trans-Canadian Aero Marine. Since only $5,500.00 of the sale proceeds from Ray Breeden went to Continental Aero-Marine it would hardly be worth it for Defendant to have sold the plane if that is the extent of the cash he would receive. Moreover, Trans-Canadian Aero Marine is another corporation represented by Darryl Myers out of his Bank of Nova Scotia account.

However, unlike with respect to the other assets, in this instance there is a feasible alternative explanation. Trans-Canadian held the lien on the plane, which lien was paid off upon its sale. The issue is not whether Defendant was the actual purchaser, but where he obtained the funds. The court is unable to conclude beyond a reasonable doubt that Trans-Canadian was not a separate corporation, over which Defendant had no control. It could have been an independent lending corporation, represented by an attorney who had prior dealings with Defendant and knew that the Colonial Manor sale was on the horizon, so that a loan would not be a risk. Another explanation may be more likely, but it is not indisputably the case.

The court is also unable to find sufficient identity between Chardon Company, N.V., and Defendant. Although the facts surrounding the relationship, especially the willingness of the corporation to lend Mitchell substantial sums without financial information and the $500,000.00 "key man" insurance policy to which Defendant would have been the beneficiary, arouse suspicion, they are not entirely inconsistent with the status of Chardon as an independent lender represented by Myers and Defendant. Either way this has little effect on the forfeiture analysis other than providing an additional connection between the

tainted funds and Colonial Manor. The court is satisfied with the other evidence to the effect that Mitchell received under-the-table payments and so finds that the purchase of Colonial Manor was made with funds derived from Defendant's racketeering activity. Consequently, as above noted, the proceeds from sale of the apartments remain tainted. This in turn means that, although Defendant obviously had sufficient funds to purchase numerous assets after 1980, any assets he acquired through enterprise corporations using Colonial Manor proceeds, namely the Bluebird Wanderlodge, or the amount of the proceeds so used, are forfeitable.

V.

Defendant has expressed two additional concerns: (1) that there be a sufficient nexus between the racketeering activity and the assets forfeited, and (2) that the forfeiture not be disproportionate to the offense. Neither issue poses a problem in this case.

The nexus requirement is clearly satisfied. In *United States v. Conner*, 752 F.2d 566 (11th Cir.), *cert. denied, Taylor v. United States*, 474 U.S. 821 (1985), the Eleventh Circuit said that in finding the defendant guilty the jury had decided that a nexus existed. This court recognizes the validity of that holding with respect to the verdict, but also realizes that an order of forfeiture requires more specific findings. For a conviction the jury need only be satisfied that "any part" of income derived from racketeering activity was used or invested, but the court (or the jury if the Rule 31[e] right had not been waived) must determine what parts, *i.e.*, what amounts, of such income have been used or invested in order to deduce the appropriate forfeiture amount.

In making those specific findings, however, the court satisfies the nexus requirement. The nexus consists of the fact that the interests (assets) were purchased by Defen-

dant's use or investing of income derived from racketeering. No further nexus is required by Section 1962(a) because subsection (a) is directed at subsequent investment. Unlike *in rem* forfeiture, the assets need not have been involved in the racketeering. Nor is it necessary that racketeering occur at the time or after these interests were acquired. The Section 1962(a) violation can occur long after the last racketeering act; therefore the essential link between the funds used and their initial source is sufficient.

Nor is the penalty to be imposed disproportionate to the offense. First of all, forfeiture is a mandatory penalty which the court must impose when the jury finds a violation of Section 1962. *United States v. Hess*, 691 F.2d 188, 190 (4th Cir. 1982). Secondly, although some circuits have expressed hesitation about ordering forfeiture of an entire business interest, regardless of the amount of legitimate versus illegitimate activity, *see United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), (emphasizing the district court's discretion and warning against "draconian and perhaps potentially unconstitutionally applications of the forfeiture provision"), *cert. denied*, 445 U.S. 927 (1980); *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987) (recognizing the need for courts to use their discretion in fashioning forfeiture order within bounds of eighth amendment), others, including the Fourth Circuit, have maintained that Section 1963 requires forfeiture of defendant's entire interest, if it is in violation of Section 1962. *Hess*, 691 F.2d at 190; *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir.) (RICO forfeiture is intended to make defendant forfeit entire interest in the RICO enterprise), *cert. denied*, 464 U.S. 825 (1983); *United States v. Rubin*, 559 F.2d at 991-92 (court does not have to determine the degree of the enterprise's taint).

Thirdly, even accepting the position of the Ninth Circuit in *Busher* that the eighth amendment imposes constraints upon forfeiture, the present case is fully

compatible with the Ninth Circuit's analysis. The Ninth Circuit held that trial courts must use their discretion in determining whether the interest forfeited is "grossly disproportionate" to the offense. The court also stated, however, that:

> [T]he forfeiture is not rendered unconstitutional because it exceeds the harm to the victims or the benefit to the defendant. After all, RICO's forfeiture provisions are intended to be punitive. The eight amendment prohibits only those forfeiture [sic] that, in light of all the relevant circumstances, are *grossly* disproportionate to the offense committed.

817 F.2d at 1415 (emphasis in original).

Further, the *Busher* court noted that in considering the gravity of the offense the harm done is an important factor, and the magnitude of harm is drastically increased when the crime is likely to have "severe collateral consequences, *e.g.*, drug addiction." *Id.*

Finally, the court cautioned against ordering forfeiture of a defendant's entire interest if the enterprise is essentially legitimate and the RICO violations are minor. However, "if . . . an interest in an enterprise was acquired entirely or almost entirely with ill-gotten funds, it would not normally violate the eighth amendment to order forfeiture of all of defendant's interest in that enterprise."

This court finds that the penalty to be imposed upon Defendant is not grossly disproportionate to his offense. Defendant violated a public trust for substantial personal gain, and in so doing quite likely contributed to substance abuse, by permitting Keidaish and his associates to import controlled substances. Moreover, since the interests to be forfeited were all acquired with income derived from Defendant's racketeering, complete forfeiture of those interests is justified.

The court also finds the Second Circuit's holding in *United States v. McKeithen*, 41 Crim. L. Rep. 2289 (2d Cir. June 30, 1987), inapposite. That case involves forfeiture of real estate under the Continuing Criminal Enterprise ("CCE") statute (21 U.S.C. § 848). Although CCE forfeiture is similar to the RICO section, 21 U.S.C. § 848 does not contain a provision equivalent to 18 U.S.C. § 1963(a)(1). The holding in *McKeithen* was that only part of the real estate afforded a source of influence over the existing enterprise. The court's findings in the present case, however, have not concerned influence over an existing enterprise, but rather acquisition of interests with use of racketeering funds, and therefore the closer nexus required by the Second Circuit in *McKeithen* is not applicable.

The 1984 amendment to Section 1963 expressly protects from forfeiture assets transferred to third-party purchasers. 18 U.S.C. § 1963(n)(2). The version of Section 1963 applicable to Defendant does not include such language, but it does instruct the United States to make "due provision for the rights of innocent persons." This clause should be read to protect the interests of the third parties, especially since subsequent tracing of assets is unnecessary for forfeiture and the government may recover the amount spent in violation of Section 1962. Satisfaction of the forfeiture judgment is a matter of collection, and the government should be limited to Defendant's existing assets and those which he transferred in an effort to defraud the government.[2]

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[2]To rule otherwise would be to treat the earlier version of Section 1963 as more stringent than the version introduced under the Comprehensive Crime Control Act of 1984. In fact, the 1984 version was enacted in part to stiffen the forfeiture provisions and prevent defendants from avoiding forfeiture by pre-conviction transfers. S. Rep. No. 225, 98th Cong., 2d Sess. 194, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3377, *quoted in United States v. Bassett*, 632 F. Supp. 1308, 1312 (D. Md.), *aff'd*, *United States v. Harvey*, 814 F.2d 905 (1986), *reh'g en banc granted* (1987).

CONCLUSIONS OF LAW

1. Defendant's receipt of money from Philip Keidaish constituted violations of 28 U.S.C. § 201(c)(3).

2. Violations of Section 201(c)(3) are predicate offenses under RICO, and Defendant's multiple instances constitute a "pattern of racketeering activity" for purposes of 28 U.S.C. § 1962.

3. The money received from Keidaish is "income derived directly . . . from a pattern of racketeering activity," while money Defendant withdrew from bank accounts which represents a prior deposit of the tainted funds is "income derived . . . indirectly from a pattern of racketeering activity" for 1962(a) purposes.

4. Defendant purchased the Colonial Manor Apartments in part with income derived directly or indirectly from his racketeering activity, but that investment was not in an enterprise engaged in interstate or foreign commerce and does not constitute a violation of Section 1962(a).

5. Since Defendant invested some tainted money in acquiring Colonial Manor, the proceeds of sale from Colonial Manor remain "income derived . . . indirectly from a pattern of racketeering activity" under Section 1962(a).

6. Real Tech International, Silver Realty, and Costalotta Inc. constitute an "enterprise engaged in interstate . . . commerce" for purposes of Section 1962(a).

7. Defendant in effect invested funds in or used funds through the enterprise to the extent of the purchase prices in making the following acquisitions in corporate solution:

Real Tech	Groometown Road	$172,170.00
	1980 Sea Ray	$ 63,232.00
	1979 Mercedes 450 SEL	$ 29,800.00
	1980 Mercedes 450 SL	$ 33,543.00

Silver Realty	1975 FMC	$ 32,000.00
	1979 Jeep CJ-7	$ 8,194.23
	1980 Jeep CJ-7	$ 8,247.20
Costalotta	1980 Bluebird Wanderlodge	$206,121.80
	Total	$553,308.23

8. The money used to fund these acquisitions was income derived directly or indirectly from Defendant's racketeering activity.

9. Each purchase is a violation of Section 1962(a) and insofar as the assets are therefore "interests acquired or obtained in violation of Section 1962," either the purchase price or the asset itself is forfeitable to the government under Section 1963(a), except that in the case of existing assets transferred to bona fide purchasers the purchase price paid by Defendant and not the assets shall be forfeited.

10. Defendant also obtained the A-36 Bonanza by using or investing funds through an enterprise, but the funds are not traceable to Defendant's racketeering activity and hence the purchase does not implicate the forfeiture provision.

A judgment in accordance with the above Findings of Fact and Conclusions of Law shall be entered contemporaneously herewith.

FRANK W. BULLOCK, JR.

United States District Judge

December 24, 1987

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ORDER

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

DAVID JACK VOGT, JR.
Defendant - Appellant

No. 88-5007
(FILED August 16, 1990)

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Russell and Judge Murnaghan.

For the Court,

JOHN M. GREACEN
CLERK

(2)

No. 90-748

FILED
JAN 14 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

DAVID JACK VOGT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's racketeering conviction was barred by the statute of limitations.

2. Whether petitioner's conviction for conspiracy to defraud the government (18 U.S.C. 371) should have been reversed because the named co-conspirators were acquitted of that offense.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 910 F.2d 1184.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1990. A petition for rehearing was denied on August 16, 1990 (Pet. App. 86). The petition for a writ of certiorari was filed on November 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), in violation of 18 U.S.C. 1962(a) (Count 1), and of conspiring to defraud the government, in violation of 18 U.S.C. 371 (Count 3).[1] He was sentenced to 20 years' imprisonment and a $25,000 fine on Count 1, and to a consecutive five-year term of imprisonment and a $10,000 fine on Count 3. The court of appeals affirmed. Pet. App. 1-35.

1. Petitioner was a United States Customs Service officer stationed in southern Florida from 1971 to 1979. In May 1974, petitioner arrested Philip Keidaish, III, a member of a drug smuggling ring, on narcotics charges. From late 1976 through late 1978, petitioner received between $500,000 and $800,000 from Keidaish in return for Customs Service information that facilitated Keidaish's drug smuggling operation. In early 1979, petitioner retired from the Customs Service. Pet. App. 1-2.

Sometime after their relationship began, petitioner and Keidaish discussed various means of concealing the source of petitioner's illegally obtained money. As a result of these discussions, Keidaish introduced petitioner to Burton Levey, an attorney whose firm had helped Keidaish launder funds generated by his smuggling operations through the use of foreign bank accounts and foreign and domestic corporations.

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[1] Petitioner was acquitted of conspiring to violate the RICO statute (Count 2). Co-defendants Burton Levey and William Ray were charged with, and acquitted of, conspiracy to violate the RICO statute and conspiracy to defraud the United States.

Levey assisted petitioner through the same means to conceal the source of his funds and to use those funds and their proceeds for private purposes. Pet. App. 2. Among the other participants in the money laundering scheme was William Ray, a North Carolina attorney. *Id.* at 3.

Under the scheme, petitioner's illegally obtained money was deposited in various foreign bank accounts in the Cayman Islands and the Netherlands Antilles. The money was periodically withdrawn from those accounts and funnelled through trust accounts maintained by Levey's law firm and through five corporations (two of which were foreign, three domestic) that were either formed by or at Levey's direction or were clients of Levey's. The money was used by petitioner for investments, loans, and luxury purchases. Pet. App. 2-3.

2. A superseding indictment against petitioner, Levey, and Ray was returned on January 5, 1987. Count 1 of the indictment charged petitioner with a substantive RICO violation under 18 U.S.C. 1962(a).[2] Count 2 charged petitioner, Levey, and Ray with conspiracy to violate the RICO statute (18 U.S.C. 1962(d)), and Count 3 charged the same three with conspiracy to defraud the government (18 U.S.C. 371).

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[2] 18 U.S.C. 1962(a) provides in pertinent part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity * * * to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. * * *

The substantive RICO count against petitioner charged that

> [f]rom in or about November 1978, up to and including February 25, 1983 * * * [petitioner], having received income derived, directly and indirectly, from a pattern of racketeering activity * * * did knowingly, willfully, and unlawfully use and invest such income and the proceeds of such income, directly and indirectly, in the establishment and operation of the enterprise * * *.

C.A. App. 33-34. The pattern of racketeering activity charged in the indictment was petitioner's receipt of bribe money from Keidaish in violation of 18 U.S.C. 201(c)(3); eight predicate acts of such receipt were alleged to have occurred between December 1976 and August 1978. *Id.* at 34-35. The indictment alleged that the enterprise in which this money was used and invested was the five foreign and domestic corporations; they "functioned as a money laundering operation whereby currency received by [petitioner] from [Keidaish] would be deposited in foreign financial institutions * * *, repatriated into the United States, and invested in properties * * * held in the names of [petitioner] and/or the said corporate entities." *Id.* at 33. The indictment charged specific acts of use and investment of the bribe money and its proceeds for a period extending to February 25, 1983. Pet. App. 18.

After a two-month trial, petitioner was convicted on the substantive RICO and the conspiracy-to-defraud counts, but was acquitted on the RICO conspiracy count. Levey and Ray were acquitted on the two charges against each of them.

3. The court of appeals affirmed. Pet. App. 1-35. The court rejected petitioner's contention that the

prosecution of the substantive RICO count was barred by the statute of limitations.[3] The court held that the five-year statute of limitations applicable to the RICO offense with which petitioner was charged, 18 U.S.C. 1962(a), runs from the last act of "use or investment" of illegally derived funds or their proceeds in the "establishment or operation" of an enterprise. In so holding, the court rejected petitioner's argument that the limitations period begins to run from the last predicate act of racketeering charged. The court reasoned that "the conduct proscribed in [Section 1962(a)] is that of using or investing funds, or the proceeds of funds" and that it was appropriate to apply the "triggering rule for criminal prosecutions * * * that the statute of limitations only begins to run from the date of the last act or occurrence required to complete a crime." Pet. App. 20-21. The court held that, because the indictment charged acts of use or investment occurring within five years of the date on which the superseding indictment was returned, the prosecution was not facially time-barred. Pet. App. 18-22. The court further held that there was "abundant evidence" of such acts of use or investment during the limitations period, which justified the jury's conclusion that the prosecution was not time-barred. *Id.* at 22-27.[4]

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[3] Because RICO does not contain its own statute of limitations, prosecutions under RICO are governed by the general five-year statute of limitations in 18 U.S.C. 3282.

[4] The court cited three transactions during the limitations period in which petitioner had sold assets that had been purchased with bribe money and titled in one of the five corporations; the proceeds from those sales were deposited into petitioner's foreign bank account or otherwise put to his use. Pet. App. 22-27. The court determined that "[t]hese charging-

The court rejected petitioner's claim that his conviction for conspiring to defraud the United States had to be set aside because his two named co-conspirators were acquitted of that offense. The court determined that there was sufficient evidence of a conspiracy between petitioner and his acquitted co-conspirators to uphold the jury's verdict against petitioner, and that the acquittal of his alleged co-conspirators merely created an issue of jury inconsistency, on which petitioner was entitled to no relief. Pet. App. 34-35.

ARGUMENT

1. Petitioner renews his contention (Pet. 5-11) that his conviction on the substantive RICO count under 18 U.S.C. 1962(a) was barred by the statute of limitations. The court of appeals correctly rejected that contention.

a. Petitioner argues (Pet. 6-8), first, that the prosecution was facially time-barred because the indictment charged a pattern of racketeering that ended more than five years before the indictment was returned. In petitioner's view, the statute of limitations for all substantive RICO offenses, 18 U.S.C. 1962(a)-(c), should run from the date of the last predicate act of racketeering alleged and proved.

The court of appeals correctly held (Pet. App. 19) that petitioner's argument ignores the "critical differences between the conduct separately proscribed" in the different substantive provisions of RICO. As the court explained, it may be appropriate for the

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period transactions * * * involved * * * 'use' by [petitioner] of the 'proceeds' of the originally tainted 'income' in the 'operation' of the multi-corporation laundering enterprise." *Id.* at 25.

limitations period to run from the last predicate racketeering act for offenses under Section 1962(c), but that is not appropriate for offenses under Section 1962(a). *Id.* at 19-20 (citing *United States* v. *Torres Lopez*, 851 F.2d 520, 525 (1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989); *United States* v. *Persico*, 832 F.2d 705, 714 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); and *United States* v. *Bethea*, 672 F.2d 407, 419 (5th Cir. 1982)). Subsection (c) of Section 1962 proscribes the "conduct of [an] enterprise's affairs through a pattern of racketeering activity." Thus, the

> gravamen of the offense defined in subsection (c) is conduct which by definition is necessarily exactly coincident in time with the continuation of a pattern of racketeering activity. For the specific conduct proscribed is that of conducting an enterprise *through* a pattern of racketeering activity. Once that pattern of activity is ended, the offense under subsection (c) is complete.

Pet. App. 19. Subsection (a) of Section 1962, in contrast, proscribes using or investing funds "derived *from* the pattern of racketeering activity." Pet. App. 20. As the court reasoned:

> [s]uch a use or investment obviously need not occur, and here was not charged to have occurred, during the continuation of the pattern of racketeering activity. Unlike the offense defined in subsection (c), therefore, that defined in subsection (a) is not necessarily consummated by the last predicate act of racketeering activity. Instead, it is only consummated by the quite separate act of use or investment, hence the statute with respect to subsection (a) is only triggered by the last such act charged.

Ibid. In so concluding, the court properly applied the traditional rule that the statute of limitations begins to run upon the last act necessary to constitute the crime. Pet. App. 21 (citing *Pendergast* v. *United States*, 317 U.S. 412, 418 (1943)).

Petitioner does not challenge the court's determination that a violation of Section 1962(a) is complete only upon a "use" or "investment" of racketeering proceeds. Instead, he relies on language in other court of appeals decisions to the effect that RICO "do[es] not create 'new crimes' but serve[s] as the prerequisite[] for the invocation of increased sanctions for conduct which is proscribed elsewhere." Pet. 7 (quoting *United States* .v. *Neapolitan*, 791 F.2d 489, 495 (7th Cir.), cert. denied, 479 U.S. 939 (1986), and citing *United States* v. *Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984)). Based on this general proposition, petitioner argues (Pet. 7) that "[s]ince the gravamen of all RICO prosecutions, including those under § 1962(a), is the racketeering acts, the statute of limitations should commence to run from the commission of the last such act alleged and proved."

The court of appeals correctly rejected this argument, noting that it rests on the erroneous premise that "nothing except the predicate acts of racketeering activity * * * are to be considered as essential elements of the specific crimes defined in subsections (a)-(c), and that all other seeming elements may therefore be simply disregarded in assessing for triggering (or guilt?) purposes when the crimes defined in these subsections have been committed." Pet. App. 20-21 & n.3. As the court concluded, petitioner's reliance on broad judicial statements regarding RICO "seeks to make more of the * * * generalizations than they will bear." *Ibid.*

Contrary to petitioner's assertion (Pet. 8), the court did not ignore the desirability of uniformity in the application of the statute of limitations to substantive RICO violations. Instead, the court determined that "[t]he virtue of uniformity * * * cannot in the end override statutory text which simply prevents it." Pet. App. 21. The court correctly noted that a prosecution under Section 1962(a) "could not proceed until * * * use or investment [of tainted income] had occurred, without regard to when the pattern of racketeering activity which produced the tainted income may have come to an end." *Id.* at 21-22.[5] As the court recognized, to hold that the limitations period under Section 1962(a) commences before a prosecution could be initiated under that provision would contravene settled principles of determining the triggering event for criminal prosecutions. See *Toussie* v. *United States*, 397 U.S. 112, 115 (1970); *Pendergast* v. *United States*, 317 U.S.

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[5] Petitioner's reliance (Pet. 8) on *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143 (1987), is misplaced. There, the Court held that the four-year statute of limitations applicable to civil actions under the Clayton Act, 15 U.S.C. 15b, applies to civil actions under RICO. 483 U.S. at 146-147. The Court looked to federal rather than state statutes of limitations in part because of the desirability of having a uniform limitations period for civil RICO actions. *Id.* at 153-154. The Court did not suggest that a similar principle should apply in construing the statute of limitations applicable to criminal prosecutions under RICO. On the contrary, the Court expressly refused to analogize civil RICO actions to criminal RICO actions. *Id.* at 156. Moreover, the Court made clear that the issue before it—what limitations period to apply—was distinct from the issue of when the limitations period begins to run. *Id.* at 156-157. *Agency Holding Corp.* is therefore wholly inapposite here.

412, 418 (1943); *United States* v. *Irvine*, 98 U.S. 450, 452 (1879).

b. Petitioner further contends (Pet. 9-11) that, even if the statute of limitations for violations of Section 1962(a) runs from the last "use" or "investment" of racketeering proceeds, the prosecution in this case was time-barred because the government failed to prove that any "use" or "investment" occurred within the charging period, *i.e.*, after January 5, 1982.

The court of appeals correctly rejected this argument, based on "abundant evidence" (Pet. App. 24) that petitioner engaged in "use[s]" or "investment[s]" of racketeering proceeds after that date. The court cited three examples of such transactions, each of which involved the sale of an asset that petitioner had acquired with bribe money from Keidaish and had titled in one of the five laundering corporations. *Id.* at 25. The court concluded that each of those transactions "constituted a 'use' by [petitioner] of [tainted] funds or their proceeds in the 'operation' of the enterprise in its intended function, which was precisely to serve as a concealing conduit or repository of the funds or assets." *Id.* at 25-26.

Here, as below, petitioner makes only a narrow challenge to the adequacy of these transactions in establishing the timeliness of the prosecution. He does not challenge the court of appeals' holding that these transactions "were effected directly by or in behalf of [petitioner] * * *; that in these transactions the corporations were simply used as dummies or *alter egos* of [petitioner] specifically to conceal the source of his tainted funds; and that the funds and assets involved * * * were, at least in part, either income or the proceeds of income derived from the 1976-78 pattern of racketeering activity." Pet.

App. 24-25. Instead, petitioner asserts (Pet. 11) that these transactions did not involve the "operation" of the money laundering enterprise because he undertook them in contemplation of dismantling the enterprise.

This assertion is meritless. As the court of appeals recognized (Pet. App. 26 n.7), the "operation" of the enterprise consisted of its use as a "repository or conduit for tainted funds in order to conceal their ultimate source and beneficial ownership." The tainted funds or their proceeds were thus "use[d]" in the "operation" each time petitioner caused them to be "run into or out of one of the enterprise corporations." *Id.* at 25. It is irrelevant that in doing so petitioner may have contemplated ceasing operation of the enterprise.

2. Petitioner challenges (Pet. 11-13) his conviction on the conspiracy-to-defraud count on the ground that it is inconsistent with the acquittal of his co-defendants on this count. The court of appeals correctly rejected this challenge upon determining that "sufficient evidence exist[ed] of a conspiracy between [petitioner] and his acquitted co-conspirators to uphold the jury's verdict against [petitioner]." Pet. App. 35.

The court's approach reflects the established principle that "[i]nconsistency in a verdict is not a sufficient reason for setting it aside." *Harris* v. *Rivera*, 454 U.S. 339, 345 (1981). That principle was first enunciated in *Dunn* v. *United States*, 284 U.S. 390, 393-394 (1932), and has "stood without exception in this Court for 53 years." *United States* v. *Powell*, 469 U.S. 57, 69 (1984). See also *Standefer* v. *United States*, 447 U.S. 10, 22-25 (1980); *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943). The *Dunn* rule has been applied by the Court "with respect to

inconsistency between verdicts on separate charges against one defendant * * * and also with respect to verdicts that treat codefendants in a joint trial inconsistently." *Harris*, 454 U.S. at 345. The rule is founded on the recognition that an acquittal may result, not from a failure of proof, but from "mistake, compromise, or lenity." *Powell*, 469 U.S. at 65; see also *Dunn*, 284 U.S. at 393.

The rule of *Dunn* applies with full force in the conspiracy context. It would be "pure speculation" (*Powell*, 469 U.S. at 66) to assume that the jury's acquittal of a defendant's alleged co-conspirators signifies a conclusion that no conspiracy existed. Such speculation is in any event unnecessary. "[A] criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." *Id.* at 67.

Since this Court's decision in *Powell*, every court of appeals that has squarely considered whether the *Dunn* rule extends to conspiracy verdicts has held that it does. Pet. App. 34-35; *United States* v. *Bucuvalas*, 909 F.2d 593 (1st Cir. 1990); *United States* v. *Thomas*, 900 F.2d 37, 40 (4th Cir. 1990); *United States* v. *Valles-Valencia*, 823 F.2d 381, 382, amending 811 F.2d 1232 (9th Cir. 1987). Other courts, citing this Court's decision in *Powell*, have expressed grave doubts about the continuing validity of any exception to the inconsistent-verdict rule for conspiracy cases. See, *e.g.*, *United States* v. *Mancari*, 875 F.2d 103, 104-105 (7th Cir. 1989); *United States* v. *Dakins*, 872 F.2d 1061, 1065-1066 (D.C. Cir.), cert. denied, 110 S. Ct. 410 (1989); *Government of the Virgin Islands* v. *Hoheb*, 777 F.2d 138, 142 n.6 (3d Cir. 1985); *id.* at 142-143 (Garth, J., concurring).

Contrary to petitioner's suggestion (Pet. 13), those decisions and the decision of the court below do not conflict with *Hartzel* v. *United States*, 322 U.S. 680 (1944). *Hartzel* did not involve an inconsistent verdict; the jury returned guilty verdicts against both the defendant and his two alleged co-conspirators. *Id.* at 682 n.3. The Court set aside the defendant's conspiracy conviction because the verdicts against his co-defendants had been set aside by the lower courts on grounds of insufficient evidence. *Ibid.* The Court apparently concluded, based on the lower court rulings, that the evidence was insufficient to show that any conspiracy existed. Although the Court's one-sentence, footnote discussion of the issue is somewhat ambiguous, it appears that the Court's ruling was based on the insufficiency of the evidence against the defendant rather than the formal disposition of the convictions of the defendant's two alleged co-conspirators. Accord *Morrison* v. *California*, 291 U.S. 82, 93 (1934); *Gebardi* v. *United States*, 287 U.S. 112, 123 (1932). In any event, because *Hartzel* did not involve a conspiracy conviction that was challenged on the basis of an inconsistent verdict, petitioner's reliance on that decision is misplaced. See *United States* v. *Bucuvalas*, 909 F.2d at 596 (*Hartzel* did not involve inconsistent jury verdicts, but rather the reversal on appeal of all the co-defendants' conspiracy convictions due to insufficient evidence).

Petitioner's reliance on lower court decisions is likewise misplaced. In two of those decisions, the court expressly refused to decide whether the *Dunn* rule applied in the conspiracy context, because it was unnecessary to do so; in each case, the evidence showed that the defendant conspired with individuals other than his acquitted co-defendants. See *United States*

v. *Suntar Roofing, Inc.*, 897 F.2d 469, 475-477 (10th Cir. 1990); *United States* v. *Howard*, 751 F.2d 336, 338 (10th Cir. 1984), cert. denied, 472 U.S. 1030 (1985).

The third decision on which petitioner relies is no longer good law. In *Romontio* v. *United States*, 400 F.2d 618, 619 (10th Cir. 1968), cert. dismissed, 402 U.S. 903 (1971), the court reversed Romontio's conspiracy conviction because one of Romontio's co-conspirators had been acquitted in an earlier trial and the remaining co-conspirators were acquitted in Romontio's trial. Subsequently, in *Standefer* v. *United States*, *supra*, this Court held that a defendant accused of aiding and abetting the commission of a federal offense could be convicted despite the prior acquittal of the alleged principal. 447 U.S. at 21-25. That holding was based on the recognition that in the earlier trial the jury may have acquitted the co-defendant out of compassion or compromise. *Id.* at 22-23. Accordingly, the co-defendant's culpability could be relitigated in the later trial to determine the defendant's guilt. *Id.* at 26. Thus, if *Romontio* had arisen after *Standefer*, the government could have relitigated in Romontio's trial the culpability of the earlier acquitted co-conspirator. Under *Standefer*, the acquittal of Romontio's co-conspirator in the first trial therefore would not have barred Romontio's conviction in the second trial. In this respect, *Standefer* in effect overruled *Romontio*. See *United States* v. *Espinosa-Cerpa*, 630 F.2d 328, 331-333 (5th Cir. 1980) (relying on *Standefer* and *Dunn* to hold that acquittal of co-defendants in earlier trial did not require reversal of defendant's conspiracy conviction).

The only decision that directly supports petitioner's position is *Herman* v. *United States*, 289 F.2d 362

(5th Cir.), cert. denied, 368 U.S. 897 (1961). In *Herman*, the Fifth Circuit held that where all but one of the charged co-conspirators are acquitted in a single trial, "the verdict against the one will not stand." 289 F.2d at 368. Yet *Herman*'s continuing validity is dubious. The Eleventh Circuit sitting en banc expressly overruled it in light of *Powell*. *United States* v. *Andrews*, 850 F.2d 1557 (11th Cir. 1988), cert. denied, 488 U.S. 1032 (1989).[6] And while the Fifth Circuit has not had to confront directly the question whether *Herman* remains good law, that court has criticized *Herman* in several recent decisions. See *United States* v. *Villasenor*, 894 F.2d 1422, 1428 n.6 (1990) (stating that the holding in *Herman* regarding acquittal of co-conspirators "is of highly questionable validity" in light of *Powell*, but finding *Herman* inapposite in case before the court); *United States* v. *Davila*, 698 F.2d 715, 720 (1983) (same); *United States* v. *Albert*, 675 F.2d 712, 713 (1982) (same); *United States* v. *Espinosa-Cerpa*, 630 F.2d 328, 331-333 (1980) (same). It is therefore unlikely that the Fifth Circuit will adhere to *Herman* when the court is squarely confronted with the issue presented here. In light of the clear trend of the decisions against petitioner's position since this Court's decision in *Powell*, review of this issue is not likely to be necessary unless some court breaks with the trend and expressly adheres to the *Herman* doctrine.

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[6] In *Bonner* v. *City of Pritchard*, 661 F.2d 1206 (1981) (en banc), the Eleventh Circuit adopted as precedent all decisions of the former Fifth Circuit decided prior to October 1, 1981.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

DEBORAH WATSON
Attorney

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(3)

No. 90-748

in the Supreme Court of the United States

October Term, 1990

DAVID JACK VOGT, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

HARRY M. SOLOMON, ESQ.
HARRY M. SOLOMON, P.A.
Counsel for Petitioner
799 Brickell Plaza, #801
Miami, Florida 33131
Telephone: (305) 358-7400

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

B. Improper Application of the Phrase "To Use Or Invest" Found in 18 U.S.C. §1962(a).[1]

In its Brief In Opposition, the Government understandably parrots the conclusion of the Circuit Court that *sales* of certain assets by Petitioner subsequent to January 5, 1982 fit within the statutory requirement of "[uses or investments]" of racketeering proceeds "in acquisition of any interest in, or the establishment or operation of [an] enterprise . . ." so as to make the prosecution of Count I of the Indictment timely. See 18 U.S.C. §1962(a). (Government's Brief, pages 10-11).

That the articulated (and other similar, but unmentioned) sales of assets (A.25) could qualify as sufficient charging period transactions is premised on an unfortunate and erroneous statement of the Circuit Court that "[o]n the government's sound theory of subsection (a)'s intended application, every time tainted funds or assets purchased with tainted funds were run into or out of one of the enterprise corporations by or at [Petitioner's] direction, this constituted a 'use' by him of those funds or their proceeds in the 'operation' of the enterprise in its intended

[1]As to Questions I.A. and II., Petitioner would respectfully rely on those jurisdictional arguments advanced in his original Petition as fully responsive to and dispositive of those arguments advanced in the Brief For The United States In Opposition.

function, which was precisely to serve as a concealing conduit or repository of the funds or assets." (A.25-26) (footnote omitted). That finding, while perhaps a convenient conclusion for the Circuit Court, was not the Government's position at trial.

The Government took the position in the District Court that these post-January 5, 1982 sales of assets were undertaken not to operate the enterprise, but rather to dismantle it. As noted in the Petition (page 5), during closing argument, the Government specifically referred to these very sales of assets relied on by both the Circuit Court (A.25) and the Government in its Brief (pages 10-11) as the "dismantling" of the enterprise.[2]

Nor did Count One of the Indictment ever describe the "operation" of the enterprise "to serve as a concealing conduit or repository of the funds or assets". To the contrary, Count One of the Indictment stated that the purpose of the enterprise was to effectuate *investments* for Petitioner. (A.14). The "conduit or repository" theory is a creation of the Circuit Court, not a theory of the Government at trial. Unfortunately, Petitioner is now burdened with that characterization of the enterprise.

In its Brief (page 4), the Government states that "[t]he Indictment charged specific acts of use and investment of the bribe money and its proceeds for a period extending to February 25, 1983." This statement is somewhat misleading. Count One of the Indictment (of which Petitioner was

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[2]The Government consistently took this view of those sales during all pre-trial proceedings, as well as in related legal matters. (A.60,74, 78-79). Moreover, these sales were not, as suggested by the Government in its Brief, "in *contemplation* of dismantling the enterprise" (page 11). Under the Government's theory of prosecution, these were part of a concerted effort by Petitioner to actually dismantle the enterprise out of fear of an impending indictment in the State of Florida.

con[illegible] did not charge *any* specific acts of use and investment of the bribe money and its proceeds. To the extent that Count Two (conspiracy to violate the racketeering statute) delineated specific acts, Petitioner was acquitted of that count. The allegations of Count One must, of course, stand on their own. *Dunn v. United States*, 284 U.S. 390, 393 (1932).

In sum, on the facts of this case, the Circuit Court is incorrect in its conclusion that ". . . every time tainted funds or assets purchased with tainted funds were run into or out of one of the enterprise corporations . . . this constituted a 'use' by [Petitioner] of those funds . . . in the 'operation' of the enterprise . . ." (A.25-26). The specific sales of assets cited by the Court (and relied on by the Government) and any other sales of assets after January 5, 1982, were not (under the Government's own trial theory) made for the purpose of using or investing racketeering proceeds, but rather to dismantle the enterprise.[3] The inaccurate characterization of the enterprise by the Court is without basis in the evidence and the Government should not now be permitted to rely upon that description when it is, in fact, at odds with its own characterization of the enterprise in the charging document and at trial.

Since the post-January 5, 1982 sales of assets were made in furtherance of the dismantling of the enterprise, they do

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[3]The Circuit Court's reference to "abundant evidence of 'other things' occurring after January 5, 1982, to support a finding of timeliness" (A.24), referred to by the Government (Brief, page 10) is equally unfortunate because while it sounds so definitive, it is in fact inaccurate. While there are numerous transactions in this case, the vast majority occurred prior to 1982. None qualifies as a use or investment of racketeering proceeds in the establishment or operation of the enterprise subsequent to January 5, 1982. Petitioner would respectfully enjoin this Court to peruse the factual portions of all opinions filed in this case (A.1 et.seq, A.39 et.seq.) for transactions which actually qualify as transactions within the charging period.

not qualify as uses or investments of proceeds in the establishment or operation of that enterprise. The phrase "to use or invest" found in 18 U.S.C. §1962(a) is not broad enough to encompass sales made to destroy the enterprise.

Respectfully submitted,

HARRY M. SOLOMON, P.A.
By: Harry M. Solomon
Counsel for Petitioner
799 Brickell Plaza, #801
Miami, Florida 33131
(305) 358-7400